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Supreme Court of the United States

October Term, 1941.

No. [redacted] **116**

NIESCHLAG & CO., INC.,
Petitioner,

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Petition and Brief for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Summary Statement of Matter Involved:

This case is the first to reach this Court involving (1) negotiable "non-delivery" insurances (cf. *Ryan* v. *U. S.*, 19 Wall. [86 U. S.] 514); (2) an omnibus reclamation proceedings order in bankruptcy collaterally pleaded by a "non-delivery" insurer; (3) the right of a Federal Court, under Rules 56, 38 and 39 of the Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution, to determine issues of fact and intent on contested motion and cross-motion for summary judg-

ment made in a jury case (cf. *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389).

The action (between corporations having diverse citizenship, f. 11) is against an insurance company for plaintiff's damage by "non-delivery" on May 24, 1939, of 47,480 bags of cocoa beans, for delivery of which, and for indemnity against loss by "non-delivery" of which, respectively, plaintiff held as endorsee-pledgee-transferee for value ten negotiable or "order" warehouse receipts of Harbor Stores Corporation, incontestible under New York law, and the sixteen negotiable or "order" insurance contracts sued on, by which, in addition to underwriting other perils and risks, defendant agreed by specially added clauses "also to insure", effective on their respective dates, the risk of "damage by * * * non-delivery" of 47,480 bags of cocoa beans, identically described in the two sets of documents.

The making and issuance of both sets of instruments, the warehouse receipts and the insurance contracts, had been procured by a third party corporation, Garcia Sugars Corporation, in negotiable or "order" form, and endorsed to plaintiff for value. The certificates were so obtained for the purpose, disclosed by the Garcia Company to defendant, of being endorsed over and pledged to plaintiff, as a *bona fide* holder for value, as collateral security and indemnity to plaintiff (cf. *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, CCA 9, 59 F. [2d] 493, 495), for loans to and contracts assumed for Garcia Sugars Corporation by plaintiff (viz., for loans totaling $216,200 and contracts by which plaintiff was bound under the rules of the New York Cocoa Exchange to members thereof for delivery in September of 47,480 bags of cocoa beans); and pursuant to defendant's own purpose to induce plaintiff to forego obtaining from other insurers contracts insuring these broad risks and

conditions, which would cause Garcia's brokers and defendant to "both lose the business" (ff. 378-379).

The Seventh Defense (f. 262) was withdrawn on argument in the District Court; and the only theories of defense involve no dispute of plaintiff's *bona fide* status, genuine non-delivery risk and non-delivery loss, but the contention that defendant intended only to insure "goods" and not (as its certificates state, "also to insure" from date) the "risk of non-delivery" alleged by plaintiff (cf. Comp. pars. 45, 46, ff. 66-68 and Amended Answ., pars. 14, 15, ff. 236-239), and defendant's plea of a reclamation proceedings order, which it contends but offered no other proof to show to be *res adjudicata* as to insurable interest in "goods". Defendant does not contend that plaintiff had no insurable interest in the risk of non-delivery (Cf. *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, CCA 9, 59 F. [2d] 493).

Petitioner prays that a Writ of Certiorari issue to review a decision and judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed "on opinion below" an order and judgment of the United States District Court for the Southern District of New York, which granted a motion by defendant made under Rule 56 for summary judgment, and dismissed plaintiff's complaint with costs, and denied a cross-motion by plaintiff under Rule 56 for summary judgment. Petitioner seeks review thereof in both respects, on fundamental and important novel questions strikingly presented by the record.

Statement as to Jurisdiction.

The order and judgment of the Circuit Court of Appeals was entered on the 7th day of March, 1942 (R., p. 188). The said Court had previously filed its opinion of affirmance, February 14, 1942 (R., p. 161); petitioner

thereafter had filed, pursuant to Rule XXVII of said Court, a petition for rehearng February 28, 1942 (R., p. 162), which the Court had denied March 5, 1942. The Court's jurisdiction to entertain and grant this petition is provided by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A., Section 347 (a) (*Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498; *U. S.* v. *Seminole Nation,* 299 U. S. 417, 420-421; *Bowman* v. *Loperena,* 311 U. S. 262, 266).

Decision Below.

The only affidavits defendant filed were those "in support of said motion for defendant" (f. 453); it filed no subsequent affidavits opposing plaintiff's cross-motion nor denying the different facts shown in plaintiff's affidavits, and appears to concede that if under the facts shown in plaintiff's undenied papers the insurances are interpretable as special agreements "also to insure" from date the plaintiff's "risk of non-delivery", as alleged by plaintiff, or if the reclamation proceedings order is not itself *res adjudicata* or conclusive evidence of lack of insurable interest, defendant is liable and makes no defense.

But the affidavits filed by plaintiff, as the notice of cross-motion, the principal affidavit and the Order for Judgment show, were submitted both in opposition to the motion made by defendant and in support of plaintiff's cross-motion, plaintiff praying specifically for denial of defendant's motion (ff. 336, 354, 454; cf. *Aetna Ins. Co.* v. *Kennedy, supra*).

The Court's opinion (ff. 435-450; 43 F. Supp. 797; 126 F. [2d] 834), contrary we submit to Rules 56, 38 and 39 and the Seventh Amendment, is replete with findings of fact, painting as the surrounding facts and circumstances

the incomplete and misleading picture painted in Smith's affidavit for defendant (ff. 296-315); and conclusions incompatible with facts suppressed by defendant but proved by plaintiff are drawn as though the case did not involve such facts.

The parts taken by defendant's subordinate underwriters Thurnall and Brust, *their* understanding of the risk, their refusals and reasons for refusing to underwrite it before Smith stepped in (ff. 399-400, 403), their subsequent acts in drafting and issuing the certificates (ff. 404, 407, 408), insisting on and obtaining from the Garcia Company "lost policy" release indemnities against secretly outstanding prior insurances describing the same quantities of beans and pledged to others (ff. 394-395, 406, 408-409), as shown in plaintiff's opposing affidavits and undenied, and the failure of Thurnall and Brust to file any affidavits, are not noticed by the Court. The pretense of inspections actually made are mentioned (f. 449) as indicative of defendant's considering the risk limited; with no mention by the Court of defendant's original insistence on a special "complete inspection" to be made by outside inspectors at Garcia's expense (ff. 383, 402-403), with opposite implication, and its voluntary waiver (f. 383). Defendant's purpose to induce plaintiff to forego obtaining or demands that "non-delivery" insurances be obtained elsewhere lest defendant thereby lose the Garcia Company's business (f. 379), is ignored.

Despite defendant's admissions that it wrote for Garcia, to enable paper pledge to plaintiff, and not on any representations or inducements from plaintiff (ff. 237-238, 239; pars. 13, 14, 16), it is held factually "reasonable for defendant to believe" (f. 444) that the insurances were to be as on goods which plaintiff "owned or title to which it held" (ff. 449, 445); thereby burdening plaintiff with conditions and warranties inconsistent

with the facts, and which defendant admits were not made (f. 237).

The omnibus reclamation proceedings order made in bankruptcy proceedings of the warehouseman, collaterally pleaded by defendant, and which adjudged only that of the residue of goods in general still in the bankrupt warehouseman's possession "on the 29th day of May, 1939, the date when the above named bankrupt was duly adjudicated as such, or at any time thereafter" (f. 277), viz., five days after the non-delivery on May 24, 1939 (Comp., par. 50, ff. 71-72; undenied) none were plaintiff's, is treated as decisive (cf. *Little, et al.* v. *General Ins. Co. of America,* decided by Hulbert, *D. J.*, D. C. S. D., N. Y., May 7, 1942, holding the opposite).

Despite the fact that defendant's own "inspection" evidence showed that "the only inspections" (ff 320, 327) were made in March and April, 1939, the last more than a month previous to bankruptcy, and without any evidence whatever as to what beans were in the warehouse on May 29, 1939, affected by the order, it is treated at the outset as establishing, contrary to its terms, that plaintiff had no insurable interest in "the beans" (f. 440). The issue then is treated, not as that of what "non-delivery" itself means as risk and cause of loss in the specially added clauses, and not of whether plaintiff's undisputed "non-delivery" risk and "non-delivery" loss and valid cause of action therefor were indemnified, but as solely whether the insurances protected plaintiff "against non-delivery of goods in which it did not have any insurable interest" (ff. 441-442) or "against the fraudulent issuance of warehouse receipts" (f. 446).

The meaning of "non-delivery" under warehouse receipts and similar commercial contracts, including other forms of indemnity insurance contracts, as an admissible construction (*The G. R. Booth,* 171 U. S. 450, 459-460), is ignored.

Although ignoring throughout its opinion those "surrounding circumstances" shown by plaintiff and most eloquent of the intent of the insurances, the court states that "the question is close as to whether or not the meaning of 'non-delivery' in the light of the surrounding circumstances should be left to the jury for interpretation" (ff. 449-450), *i. e.*, even "in the light of" the incomplete and false picture painted by Smith, which the Court accepted. And the decision concludes, contrary to the evidence, that "In addition the plaintiff itself insisted upon the form used. For these reasons, the principle that the form should be construed most strongly against the insurer should be held inapplicable" (f. 450; cf. *contra, Bushey & Sons* v. *American Ins. Co.*, 237 N. Y. 24, 29).

Questions Presented.

Broadly stated, the principal questions are:

First: Where in an action on negotiable "non-delivery" insurances defendant pleads as a defense, and on motion for summary judgment under Rule 56 offers as sole proof of lack of insurable interest, risk and loss, an order made in bankruptcy proceedings of the warehouseman, in omnibus reclamation proceedings therein, which merely adjudged that of the residue of goods in the warehouse on May 29, 1939, the date of the adjudication of bankruptcy (five days later than the non-delivery on May 24, 1939), and which came into the possession of the Receivers or Trustees, none were cocoa beans of which plaintiff was owner or entitled to possession (ff. 277-278), but did not purport either to pass on the "non-delivery" damage claim of plaintiff or to identify any of the beans then on hand as those described in plaintiff's receipts or insurances;

Does such order constitute either (1) *res adjudicata* or evidence conclusively rebutting or (2) any evidence whatever rebutting plaintiff's undenied *bona fide* interest, risk and actual loss by "non-delivery", or showing lack of insurable interest and loss?

SECOND: In such an action, wherein a jury trial has been duly demanded, when on contested motion by defendant and cross-motion by plaintiff for summary judgment under Rule 56 both parties file affidavits on defendant's motion, purporting to show surrounding facts and circumstances relied on to establish the intent and meaning of the insurances, and the opposing affidavits for plaintiff show a picture of surrounding facts and circumstances, negotiations, underwriting, persons taking part therein, facts known and risks apprehended by three of defendant's underwriters (two of whom gave no affidavits for defendant), precautions taken or knowingly waived by them in checking the risk and procuring indemnities in connection therewith, their motives and purpose in underwriting the risk, and the large special premiums charged therefor, which is radically different from the picture represented in defendant's papers, is inconsistent with any theory of defense asserted, strongly supports the construction of the insurances pleaded and urged by plaintiff, and shows suppression by defendant of vital facts and its best informed witnesses;

May a Federal Court, under Rules 56, 38 and 39 and the Seventh Amendment eliminate or ignore plaintiff's undenied evidence or determine the issues of fact and intent by adopting as credible and complete the picture of surrounding facts and circumstances represented in defendant's refuted affidavits, and the theory a single defendant's underwriter now professes to have entertained, and grant defendant summary judgment, denying plaintiff a trial by jury?

Under Rules 56, 38 and 39 did plaintiff's cross-moving authorize this or constitute a waiver of jury trial of the issues involved on defendant's opposed motion (*Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393-394)?

THIRD: Does not the meaning, understood by and favorable to the *bona fide* endorsee, which the word "non-delivery" has under the negotiable warehouse receipts and the law and trade usage applicable thereto, and uniformly has under similar commercial contracts such as bills of lading and the law and trade usage applicable thereto, and under indemnity insurances written in the form of indemnity bonds, constitute an admissable meaning of the word "non-delivery" in the specially added clauses of the negotiable insurances (*The G. R. Booth,* 171 U. S. 450, 459-460), which the Court cannot disregard or reject as matter of law on contested motion for summary judgment under Rule 56?

FOURTH: Is the meaning of specially added clauses of negotiable certificates of insurance, broadly insuring from date and by their own terms against "non-delivery", to be qualified, cut down or confused as to a *bona fide* endorsee by recourse to clauses of an open policy having to do with insurances such as fire, from which "non-delivery" was excluded, and which are neither reproduced nor clearly referred to in the specially added clauses of the certificates (*Phoenix Ins. Co.* v. *De Monchy* [H. L.] 45 T. L. R. 543 [C. of A.] 44 T. L. R. 364, 366, 368, 369. *Aetna Ins. Co.* v. *Willys Overland, Inc.,* 288 Fed. 912)?

FIFTH: Contrary to the evidence, the Court below held "the plaintiff itself insisted upon the form used" (f. 450). Assuming that be so, does that justify holding "inapplicable" the principle that the form used should be con-

strued most strongly against the insurer? Should not the insurances nevertheless be most strongly construed against the insurer for profit who "adopted the language" in covering the risk (*Bushey & Sons* v. *American Ins. Co.*, 237 N. Y. 24, 27, 29)?

In holding that the omnibus reclamation proceedings order (ff. 272-279) adjudged that plaintiff did not own and was not entitled to possession of "the beans" and requires holding plaintiff had no insurable interest (ff. 439-440), the decision conflicts directly with such order itself (ff. 277-279); conflicts with the subsequent opposite decision by Hulbert, *D. J.*, in *Little, et al.* v. *General Ins. Co. of America, supra*, decided May 7, 1942; conflicts with *Armour* v. *Michigan Central R. R. Co.*, 65 N. Y. 111, 113, 117, 124, wherein the highest New York Court held that a replevin judgment pleaded had no effect on the enforceable right to "non-delivery" damage; conflicts with the following decisions *Ocean Accident & Guarantee Corp.* v. *Old National Bk.*, C. C. A. 6, 4 F. (2d) 753, 755; *Schreiner* v. *High Court of I. C. O. of F.*, 35 Ill App. 576; *Donohue* v. *Vosper*, 243 U. S. 59, 65; and *Russell* v. *Place*, 94 U. S. 606, 608, 610, establishing that an adjudication pleaded collaterally which did not purport to decide the questions raised by the suit in which pleaded is neither decisive of nor pertinent to such questions; conflicts with the following decisions *Thomas* v. *Taggart*, 209 U. S. 385; *In re Rose*, D. C. S. D. Tex., 39 F. (2d) 242; *In re Kaplan* v. *Myers*, C. C. A. 3, 241 F. 459; *Korns* v. *Thomson & McKinnon*, D. C., D. Minn., 3rd Div. 22 F. Supp. 442, app. dism'd C. C. A. 8, 102 F. (2d) 993; *Rankin* v. *Tygard*, C. C. A. 8, 198 F. 795, and cases cited; and *Poswick* v. *Cutten*, 258 N. Y. App. Div. 218, aff'd 283 N. Y. 660, establishing that claims in reclamation proceedings and orders made thereon are different, arising under different sections of the Bankruptcy Laws, from

proofs of claims (such as one by this plaintiff for "non-delivery" damage) for debts or liabilities, and neither adjudicate nor bar the latter nor the claimant's indemnity rights against third parties when collaterally pleaded; conflicts with *Richardson* v. *City of Boston,* 19 How. (60 U. S.) 263, 270 and *McNamee* v. *Hunt,* C. C. A. 4, 87 F. 298, 301, establishing that application of descriptive provisions of written instruments "to external objects described therein is the peculiar province of the jury"; and conflicts with the meaning of "non-delivery" risk, as the subject of special insurance.

The decision, assertedly based on surrounding facts and circumstances, conflicts with *Compania de Navegacion* v. *Firemens Fund Ins. Co.,* 277 U. S. 66, 68-81, in that special circumstances here of principal significance, under the *Compania* decision, are those shown in plaintiff's opposing affidavits which the Court ignored.

Petitioner had duly demanded a trial by jury (f. 10) and it did not waive by its cross-motion its right in opposing defendant's motion to a jury trial on all the issues if petitioner's cross-motion were denied (*Aetna Ins. Co.* v. *Kennedy, supra*). On defendant's motion, petitioner as the "opposing party" was entitled to have *its* evidence treated as proving all that *it* reasonably may be found sufficient to establish, and to have drawn in *its favor* all inferences fairly deducible therefrom (*Gunning* v. *Cooley,* 281 U. S. 90, 94); to have "all countervailing evidence" disregarded (*E. K. Wood Lumber Co.* v. *Andersen,* C. C. A. 9, 81 F. [2d] 161, 166, cert. den. 297 U. S. 723); and to have issues that depend on the credibility of witnesses, and the effect or weight of evidence decided by a jury (*Gunning* v. *Cooley, supra*). Smith, whose misleading assertions were adopted by the Court as established and as complete, was an interested witness whose testimony, even had it remained unrefuted, "should

have been submitted to the jury" (*Brooks* v. *People's Bank,* 233 N. Y. 87, 94). The silence of himself, Brust and Thurnall on facts which plaintiff's affidavits showed Smith had misrepresented or suppressed, was itself "evidence of the most convincing character" (*Interstate Circuit* v. *U. S.,* 306 U. S. 208, 226) for plaintiff. The Court had no right to substitute itself for the jury, pass upon the effect of the evidence, find (or eliminate by ignoring) the facts involved in the issue and render judgment thereon; but "That is what was done in the present case" (*Baylis* v. *Travellers Ins. Co.,* 113 U. S. 316, 320-321). This conflicts with the foregoing decisions and is contrary to Rules 56, 38 and 39 and the Seventh Amendment.

In determining intent, purpose and meaning as now claimed by defendant it conflicts with the following decisions establishing the rule applicable "particularly to insurance cases" (*Union Trust Co.* v. *Whiton,* 97 N. Y. 172, 173) that the questions of intent, purpose and meaning of particular words in a written instrument are questions of fact for the jury. *Wood* v. *Guarantee Trust & Safe Deposit Co.,* 128 U. S. 416, 424; *Pitney* v. *Glens Falls Ins. Co.,* 65 N. Y. 6, 17; *U. S. Rubber Co.* v. *Silverstein,* 222 N. Y. 168, 171; *Utica City Nat. Bank* v. *Gunn,* 229 N. Y. 204, 208; *Kavanaugh* v. *Kavanaugh Knitting Mills,* 226 N. Y. 185, 198; *Piedmont Hotel* v. *Nettleton Co.,* 263 N. Y. 25, reversing a summary judgment; *Rosenkranz* v. *Schreiber Brewing Co.,* 287 N. Y. 322, 325; *Rey* v. *Simpson,* 22 How. (63 U. S.) 341, 347.

In failing to give effect to evidence that the specially added clauses agreeing "also to insure" against "non-delivery" caused and were designed to cause plaintiff to rest satisfied the risk was fully covered and to forego insuring it elsewhere, as it clearly could have done (*Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. [2d] 493), defendant fearing that otherwise

it might "lose the business" (ff. 378-379), the decision conflicts with the following decisions establishing that one may not so entrap or mislead another and then avoid liability; *National Bank* v. *Insurance Co.*, 95 U. S. 673, 678; *Voorhis* v. *Olmstead*, 66 N. Y. 113, 117, 118; *Conrow* v. *Little*, 115 N. Y. 387; *Skinner* v. *Norman*, 165 N. Y. 565, 571; *Reynolds* v. *Commerce Fire Ins. Co.*, 47 N. Y. 597, 604; *Nellis* v. *Western Life Indemnity Co.*, 207 N. Y. 320, 324; *Wolfe* v. *Security Fire Ins. Co.*, 39 N. Y. 49, 51; *Pratt* v. *N. Y. Central Ins. Co.*, 55 N. Y. 505, 512; *Rice Oil Co.* v. *Atlas Assur. Co.*, C. C. A. 9, 102 Fed. (2d) 561, 576; and that defendant's duty was enlarged by knowledge that endorsement of the insurances to plaintiff for its reliance was the specifically intended "prospective use" (*Glanzer* v. *Shepard*, 233 N. Y. 236, 240) thereof, and the "end and aim of the transaction" (*Id.* 233 N. Y. 238-239; *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 181, 182).

In so far as the decision is based on findings as to what defendant did not know or was not informed, and as to the limited nature of inspections defendant says it actually made, and ignores its initial demand for "complete" inspection, and its later assuming to make such inspection as it deemed necessary, it conflicts with *Supreme Lodge K. P.* v. *Kalinski*, 163 U. S. 289, 298; *Fidelity & Deposit Co.* v. *Queens Co. Trust Co.*, 226 N. Y. 225, 233; *Columbian Nat. Life Ins. Co.* v. *Rodgers*, C. C. A. 10, 116 Fed. (2d) 705, 707, cert. den. 313 U. S. 561; and with *Rochester & C. T. R. Co.* v. *Paviour*, 164 N. Y. 281, 284-285 and *Soma v. Handrulis*, 277 N. Y. 223, 233-234.

Assuming that as held below (fol. 445) contrary to ample evidence defendant "did not know of the issuance" or "negotiation to plaintiff" of the warehouse receipts, the decision conflicts with *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 461; *Western N. Y. Life Ins. Co.* v. *Clinton*,

66 N. Y. 326; *Keyes* v. *Anderson*, C. C. A. 8, 262 F. 748; and *O'Brien* v. *North River Ins. Co.*, C. C. A. 4, 212 F. 102, 105, in holding that this, or the lack of specific enumeration of them in the insurances, is ground for giving the coverage a more narrow rather than a broader meaning. In determining such issue by accepting Smith's limited assertions, without a trial to enable "full examination" of him, Brust and Thurnall, "who could have given further testimony on the subject," it conflicts with *Stewart* v. *Southern Ry. Co.*, No. 161, Feb. 16, 1942, 86 L. ed. 548, 550.

Its ignoring defendant's suppression of facts and witnesses conflicts with *Equitable Life Ins. Co.* v. *Halsey Stuart & Co.*, 312 U. S. 410, 426; *Runkle* v. *Burnham*, 153 U. S. 216, 225; *Interstate Circuit* v. *U. S.*, 306 U. S. 208, 226.

In so far as the decision holds that the certificates in covering "non-delivery" were endorsements to an open policy covering goods, and this made it reasonable for *defendant* to believe they were conditioned accordingly, it conflicts with the express provisions of the certificates which do not certify endorsements of "non-delivery" insurance to the policy, but themselves specially agree "also to insure" from their own date against "non-delivery"; and conflicts with *Phoenix Ins. Co.* v. *De Monchy* (H. L.) 45 T. L. R. 543 (C. of A.) 44 T. L. R. 364, 366, 368, 369; *Aetna Ins. Co.* v. *Willys Overland, Inc.*, N. D. Ohio, 288 Fed. 912, and *Imperial Shale Brick Co.* v. *Jewett*, 169 N. Y. 143, establishing the independence of the certificate insurances; with *Eddy* v. *Farmers Mutual Ins. Co.*, 20 N. Y. App. Div. 109, establishing that special insurances are not affected by other clauses; with *Aldrich* v. *N. Y. Life Ins. Co.*, 235 N. Y. 214, 224, and *Nellis* v. *Western Life Indemnity Co.*, 207 N. Y. 320, establishing that an apparent meaning of a clause will be binding

though at variance with an obscurely expressed real meaning intended by the insurer; with the following decisions establishing that the character or meaning of a particular insurance is to be determined by the nature of the contract it expresses according to the facts in evidence and regardless of the nomenclature of a policy or the character or avowed purposes of the company that issued it (*Knott* v. *Security Mutual Life Ins. Co.*, 161 Mo. App. 579, 144 S. W. 178; *Oceanic Steam Navigation Co., Ltd.* v. *Evans*, 40 Comm. Cas. 108, revg. 50 L. T. R. 256; *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, C. C. A. 9, 59 F. (2d) 493; *O'Brien* v. *North River Ins. Co.*, C. C. A. 4, 212 Fed. 102, 105, 106; *Bidwell* v. *Northwestern Ins. Co.*, 24 N. Y. 302); and with *Bekins* v. *Lindsay-Strathmore Irr. Dist.*, C. C. A. 9, 114 Fed. (2d) 680, 684, cert. den. 312 U. S. 693, rehearing denied 312 U. S. 716, establishing that not the "label" but "all of the acts, statements and writings" shown by "the entire record" determine contractual intent.

Assuming that defendant was an innocent insurer, deceived by the Garcia Company and its controlled warehouse, the decision conflicts with *General Interest Ins. Co.* v. *Ruggles*, 12 Wheat. (25 U. S.) 408, 410-414; *Ryan* v. *U. S.*, 19 Wall. (86 U. S.) 514; *Comptoir Nationale d'Escompte de Paris* v. *The Law Car & General*, reported in Macgillivray on Insurance Law, 2nd Ed. 504; *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, C. C. A. 9, 59 Fed. (2d) 493; *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326; *McWilliams* v. *Mason*, 31 N. Y. 294; and *Rothschild* v. *Frank*, 14 N. Y. App. Div. 399, in not applying the principle that of two innocent parties it was defendant's duty to protect itself without relying on plaintiff, and plaintiff's right to rely on the insurances unqualified by fraudulent acts of the Garcia Company or its warehouse company.

In its determination of the meaning of "non-delivery" in the insurances the decision conflicts with the following decisions defining equivalent terms in bills of lading, *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190, 195; *Davis* v. *Roper Lumber Co.,* 269 U. S. 158, 161; *M. & T. Trust Co.* v. *Export S. S. Corp.,* 262 N. Y. 92, 98; cert. den. 290 U. S. 650; with *The Falcon,* 3 Blachf. 64 and *Roberts* v. *Chittenden,* 88 N. Y. 33; and with the following decisions establishing that plaintiff sustained loss by "non-delivery", for which in New York the warehouseman is liable in an action for damage by "non-delivery" (*Armour* v. *Michigan Central R. R. Co.,* 65 N. Y. 111; *Hanover National Bk.* v. *American Dock & Trust Co.,* 148 N. Y. 612; *Rosenberg* v. *P. Viane, Inc.,* 109 Misc. 215 on "non-delivery" interpleader, and double judgment rendered therein, *sub nom. Joseph* v. *P. Viane, Inc.,* 118 Misc. 344, affd. 206 App. Div. 698); for which a bonded warehouseman and his bondsman alike are liable for "non-delivery" damage (*Maryland Casualty Co.* v. *Washington Loan and Banking Co.,* 167 Ga. 354); for which a surety on a "delivery" bond is liable (*Ryan* v. *U. S.,* 19 Wall. [86 U. S.] 514); and for which an indemnity insurer is liable under a contract indemnifying against damages for "lack of delivery" (*Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. [2d] 493); and conflicts with *The G. R. Booth,* 171 U. S. 450, 459-460, in failing to apply such meanings.

In giving to the term used a more narrow rather than a broader special meaning in the insurances than it has under the warehousing or carrier relationships, the decision conflicts with *Aschenbrenner* v. *U. S. F. & G. Co.,* 292 U. S. 80.

The following are the few prior decisions found involving insurance contracts—all non-negotiable—covering "delivery", "lack of delivery" or similar risks. *Ryan*

v. *U. S.* (1873) 19 Wall. [86 U. S.] 514; *Comptoir Nationale d'Escompte de Paris* v. *The Law Car & General* (1908) K. B. (1909) C. A., reported only as we find in Macgillivray on Insurance Law, 2nd Ed., 504, *et seq.; Maine Lumber Co.* v. *Maryland Casualty Co.* (1926) 216 App. Div. 35, affd. 244 N. Y. 537; *National Bank of Tacoma* v. *Aetna Casualty & Surety Co.* (1931) 161 Wash. 239; *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma* (1932) C. C. A. 9, 59 F. (2d) 493; *Luikart* v. *Mass. Bonding & Ins. Co.* (1935) 129 Neb. 771, 263 N. W. 124. All hold the insurer liable where a risk existed under and there was violation of a delivery obligation fixed by law or contract; and the decision below conflicts therewith and with *The G. R. Booth, supra,* in failing to apply such meaning.

The date sequence of such decisions illustrate the recent development of "lack of delivery" or "non-delivery" indemnity insurances; and in *Winter on Marine Insurance,* by defendant's president, the first edition (1919) did not discuss "non-delivery" insurance, whereas the second edition (1929) discusses it as a form developed since the World War.

Petitioner further contends that such negotiable insurances specially agreeing "also to insure" from date against "non-delivery" for protection of an endorsee and under circumstances such as shown by plaintiff's papers, are not insurances of bailed physical property, like the earlier fire insurances, requiring and subject to condition or warranty of existence of, and an insurable interest of the endorsee in bailed physical property, as such; but are insurances of what defendant's president WINTER himself has called the endorsee's "insurable risk" and "insurable hazard" of a "liability-loss" by non-delivery in which such "specially enumerated" risk constitutes one of the "true liabilities of the carriers [or warehouse-

man] for which they are liable under their bill of lading" [or warehouse receipts]; and cover any "non-delivery" liability of such a bailee-contractor imposed by law or fixed by contract (*Winter on Marine Insurance,* 2d Ed., 170-171, 113, 129; bracketed words ours). They afford protection to the endorsee, additional to that of the bailee-contractor's own engagement, which the endorsee's *risk* itself fully entitles him to obtain and enforce (*Great Lakes Transit Corp.* v. *Interstate Steamship Co.,* 301 U. S. 646, 652, 653). The decision conflicts therewith; and the questions on which this Court has not yet passed, as to the rights of an "order" merchant, banker, consignee or pledgee, under these negotiable "non-delivery"—or, as WINTER puts it, "*liability* loss"—insurances, we submit, closely parallel in nature and importance those reviewed, and the rulings thereon in this case below closely parallel those reversed, in *Great Lakes Transit Corp.* v. *Interstate Steamship Co., supra,* wherein this Court granted certiorari "In view of the importance of the issue" (301 U. S. 648).

Its ruling that plaintiff had no insurable risk and interest also conflicts with the following decisions establishing that "No legal obstacle prevents parties, if they so desire" from insuring against loss even though, unknown to the parties, the risk and the loss covered may already have occurred (*U. S.* v. *Patryas,* 303 U. S. 341, 345; *General Interest Ins. Co.* v. *Ruggles,* 12 Wheat. [25 U. S.] 408, 418), that "whatever act, event or property, bears such relation to the person seeking insurance, as that it can be said, with a reasonable degree of probability, to have a bearing upon his prospective pecuniary condition" may be insured (*Rohrback* v. *Germania Fire Ins. Co.,* 62 N. Y. 47, 53-54), and that any *bona fide* risk supports insurance thereof *Lucena* v. *Crawford,* 2 Bos. & Pul. 75, 7 Term. 13; *Hooper* v. *Robinson,* 98 U. S. 528, 538; *General Interest*

Ins. Co. v. *Ruggles, supra; Hancox* v. *Fishing Insurance Co.*, 3 Sumn. 132; *Insurance Co.* v. *Thompson*, 95 U. S. 547, 549-550; *Harrison* v. *Fortlage*, 161 U. S. 57, 65; *Filley* v. *Pope*, 115 U. S. 213, 220; *Empire Development Co.* v. *Title G. & Tr. Co.*, 225 N. Y. 53, 58-59; *National Filtering Oil Co.* v. *Citizens Ins. Co.*, 106 N. Y. 535; *Cone* v. *Niagara Fire Ins. Co.*, 60 N. Y. 619, 621; *Waters* v. *Merchants Louisville Ins. Co.*, 11 Pet. (36 U. S.) 213, 221; *Inglis* v. *Stock* (1885) 10 A. C. 263, and *Stock* v. *Inglis* (1884) 12 Q. B. 564; *Thompson* v. *Taylor*, 6 Term. 478; *Stirling* v. *Vaughan*, 11 East. 529; and conflicts with *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 44, establishing that "the protean basis" of any such rule never prevents enforcement of a contract where no publicly injurious results can follow its enforcement.

In confusing "non-delivery" indemnity insurances of this character with guaranty or suretyship, treating plaintiff's contention as involving guaranty, and treating the issue as involving choice between guaranty or suretyship and property insurance of beans, the decision conflicts with *Great Lakes Transit Corp.* v. *Interstate Steamship Co., supra*, 301 U. S. 646, 652; and with *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma, supra; National Bank of Tacoma* v. *Aetna Casualty & Surety Co.*, 161 Wash. 239, 244; *First National Bank* v. *National Surety Co.*, 228 N. Y. 469; *Assets Realization Co.* v. *Roth*, 226 N. Y. 370; *Maine Lumber Co.* v. *Maryland Casualty Co.*, 216 N. Y. App. Div. 35, affd. 244 N. Y. 537; and *Moore* v. *Capital Nat. Bank of Lansing*, 274 Mich. 56.

In ignoring or going back of "non-delivery" to the "reason" (f. 261) alleged but unproved by defendant and purportedly found (without evidence) by the Court (f. 446), the decision conflicts with *Ins. Co.* v. *Transportation Co.*, 12 Wall. [79 U. S.] 194, 199; and *Bird* v. *St. Paul F. & M. Ins. Co.*, 224 N. Y. 47, 53, 55, establishing

that especially in insurance the *causa proxima* alone, and not the antecedent cause of that cause or *causa causans,* is to be considered; with *Baldwin* v. *Childs,* 249 N. Y. 212, 215, establishing that even were defendant's allegation proved, plaintiff had enforceable delivery rights, obligating both the Garcia Company and the warehouseman "to feed" such rights; with the "lost policy" release evidence showing defendant apprehended precisely such obligation as the particular risk existing; and with *Ryan* v. *U. S., supra,* 19 Wall. (86 U. S.) 514, and *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma, supra,* C. C. A. 9, 59 F. (2d) 493, showing that non-delivery default is itself the risk, condition and event occasioning liability without differentiation even on proof of a third party's fraud.

Both lower courts state that "the queston is close" (ff. 449-450). This Court at the present term, in reversing a judgment directed for a defendant, in *Jacob* v. *City of New York,* No. 589, decided March 30, 1942, held that even where "Without doubt the case is close and a jury might find either way," such "is no reason for a Court to usurp the function of the jury" (*Cf. Baylis* v. *Travellers Ins. Co., supra,* 113 U. S. 316, 320-321). The decision below conflicts therewith. Here the question was made assertedly "close" by the Court considering only the picture painted in defendant's affidavits; misconstruing the omnibus reclamation proceedings order; making findings favorable to defendant on conflicting evidence or without evidence to support them; ignoring plaintiff's evidence; ignoring plaintiff's undisputed "non-delivery" risk and loss, and the established meaning of "non-delivery" under warehouse receipts, bills of lading, other indemnity insurances and other commercial contracts; and refusing "In addition" (f. 450), in direct conflict with *Bushey & Sons* v. *American Ins. Co.,* 237 N. Y. 24, 29, to

apply the principle that the language used should be construed most strongly against the insurer.

Reasons for Granting the Writ.

As hereinabove indicated, the Circuit Court has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on similar matters; it has decided important questions of local New York law and rights thereunder probably in conflict with applicable local decisions; it has decided important questions of Federal law and practice which have not been, but should be, settled by this Court, and has decided them in a way probably in conflict with applicable decisions of this Court, and in conflict with Rules 56, 38 and 39 of the Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution; it has decided important questions of commercial and insurance law, of novelty and public importance, and of probable world wide importance, in a way probably in conflict with State and National policy, and with applicable decisions of this Court and of other Federal, State and English Courts; and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

The importance of the questions lies, not only in the importance of establishing the proper construction and meaning of novel and special negotiable "non-delivery" insurances now widely in use by indemnity insurers such as defendant, the proper means and method of proving and determining the construction and meaning thereof, and the proper applicability thereto of the meaning, understood by and favorable to a *bona fide* endorsee

thereof, which the word "non-delivery" has by trade usage and under warehouse receipts and other forms of commercial contracts, under other forms of similar indemnity insurances, and under Federal and local New York court decisions, and whether such meaning is fixed or relative and determinable in each case from the peculiar surrounding facts and circumstances; and not only in the importance of establishing the proper construction and effect when collaterally pleaded of omnibus reclamation proceedings orders in bankruptcy; but also, and especially, in the circumstance that the lower courts have assumed power under Rule 56 to determine disputed factual issues herein both as to the surrounding facts and circumstances and as to the intent, purpose and meaning of particular words used in written contracts of insurance, and to ignore issues and evidence in connection therewith, contrary to Rules 56, 38 and 39, the Seventh Amendment and previous decisions of this Court and other Courts.

The decision, if allowed to stand, must have far reaching importance as a precedent, and will create great confusion in the commercial and insurance worlds, in matters of bankruptcy and *res adjudicata,* and in Federal trial and summary judgment procedure and the administration of justice. It will enable any Federal Court, despite the fact that a jury trial has been demanded, to take the issues away from the jury and decide the case itself, whenever a motion for summary judgment is made and opposed under Rule 56, without regard to how opposite the factual picture appears in the opposing affidavits or how completely these refute the moving party's claims, show its suppression of facts, records and best informed witnesses and establish the opposing party's case. And it will reverse the rules heretofore obtaining for construing insurance contracts of insurers for profit

most strongly in favor of a *bona fide* insured and against the insurer.

Respectfully submitted,

NIESCHLAG & CO., INC.,

By PAUL W. KOCHER, Treas.,
Petitioner.

Dated, New York, June 3, 1942.

We hereby certify that we are counsel for petitioner in the above matter in this Court; that we each have examined the foregoing petition and in our opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for purpose of delay.

HAROLD T. EDWARDS,
CHARLES A. ELLIS.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

NIESCHLAG & CO., INC.,
Petitioner,

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Brief in Support of Petition for Certiorari.

Reference has been made in the petition to jurisdictional provisions, the proceedings and opinions below, the questions and conflicts presented, and the grounds for review.

Summary of Conflicting Evidence as to Surrounding Circumstances, Facts and Intent; Defendant's Suppressions of Evidence Thereof and of Witnesses; and the Admissions and Issues Made But Ignored by the Court.

After previously moving without success (see Opinion of Knox, *D. J.*, R., pp. 155-157) to eliminate much of the significant surrounding facts and circumstances by striking certain allegations (pars. 23, 24, 25, 40, 45, 49 and parts of paragraphs 46 and 47) from plaintiff's verified complaint, defendant filed an unverified amended answer, and moved simultaneously for summary judgment.

In support of its summary judgment motion, defendant submitted affidavits of Bogardus, Craig and Smith, who were Vice-Presidents, and Bedell and Leyshon, employees of defendant; all accordingly interested witnesses. Defendant did not submit any affidavits of its underwriters Brust and Thurnall (cf. *Equitable Life Ins. Co.* v. *Halsey Stuart & Co.*, 312 U. S. 410, 426; *Runkle* v. *Burnham*, 153 U. S. 216, 225; *Interstate Circuit* v. *U. S.*, 306 U. S. 208, 226, and cases cited); and the motion evinced a continued tactical purpose of defendant to suppress surrounding facts and circumstances, and witnesses, and to induce rendition of judgment without consideration thereof.

Bogardus' affidavit (ff. 285-287) related only to the Seventh Defense (f. 262) of Garcia's alleged premium default, withdrawn as noted in the Petition (p. 3).* Craig's affidavit (ff. 290-293) merely repleads by reference the omnibus reclamation proceedings order. And no independent proof on its defenses as to the alleged reason for the non-delivery or the alleged lack of insurable interest was offered.

Bedell and Leyshon were inspectors, whose affidavits (ff. 317-321, 323-327) purport only to cover "the only inspections which I made" (ff. 321, 327), which were in March and April, 1939 (ff. 318-320, 324-325), with none at the time of or subsequent to the bankruptcy.

Smith's affidavit (ff. 296-315) alone purports to cover any of the negotiations between defendant and Garcia Sugars Corporation or its brokers for the insurances. It purports to cover negotiations in which *Smith* took part and is "competent to testify to" (ff. 296, *et seq.*; cf. Rule 56[e])—presenting, in absence of any affidavits then or later by Brust and Thurnall, serious ground for hold-

*Defendant withdrew this defense on oral argument in District Court as not affecting plaintiff's rights and has agreed this withdrawal applies, and will be conceded, throughout appellate proceedings.

ing Smith's affidavit was "presented in bad faith" (Rule 56[g]; cf. *Equitable Life Ins. Co.* v. *Halsey Stuart & Co., supra; Runkle* v. *Burnham,* 153 U. S. 216, 225; *Interstate Circuit* v. *U. S.,* 306 U. S. 208, 226 and cases cited).

Plaintiff submitted affidavits by its president, Nieschlag (ff. 341-354); its treasurer, Kocher (ff. 356-365); two of the Garcia Company's brokers, Benfield (ff. 368-390) and Skillman (ff. 392-410); the former secretary and treasurer of the warehouse corporation, McMackin (ff. 413-417); and the secretary of the New York Cocoa Exchange, Cross (ff. 419-426). Those of Nieschlag, Kocher and Cross make clear plaintiff's genuine risks, the latter showing that in addition to the $216,200 advances made, petitioner as an Exchange member was bound for specific performance of delivery (f. 422) under the Exchange contracts for September delivery sales shown by Nieschlag (ff. 349-352). Nieschlag and Kocher make clear plaintiff's insistence to the Garcia Company throughout on insurance of non-delivery risk or "non-performance by the warehouseman of the delivery obligation" (f. 358), and on "plaintiff's being fully insured against all conceivable warehouse risks" (f. 346); and their understanding that by the final form of negotiable insurances tendered and accepted "plaintiff was insured specifically by the defendant of the future delivery by Harbor Stores Corporation, on demand, of the quantities of cocoa specified" (f. 347). McMackin established that the warehouse receipts were duly signed by proper officers and issued by the warehouse company (ff. 414-415).

For any details of the negotiations between Garcia's brokers and defendant, in which plaintiff was not represented and had no part, plaintiff had perforce to rely on affidavits of Garcia's brokers, Skillman and Benfield. In Winter on Marine Insurance (2d. Ed.) p. 375, defendant's president shows how closely such brokers' interest

is with defendant. Their affidavits here for plaintiff, who was not even their customer, are despite adverse interest.

Comparing the pictures shown, Vice-President Smith, who Benfield discloses was defendant's senior underwriter (f. 377), insinuates that *he* handled all the insurances. He recites issuances of the first lot of six March 20, 1939 certificates, and the first supplementing "endorsements to the above certificates" on March 24, 1939 (ff. 298-300), insinuating but not asserting he took part therein. Actually, both were handled by junior underwriter *Brust* with *Skillman*. Most significantly, prior negotiable insurances describing the same quantities of beans were still secretly outstanding pledged together (as defendant admits was Garcia's custom) with warehouse receipts, to others of Garcia's creditors; and *Brust* realized those being issued constituted but were not marked as duplicating insurances, and he obtained "lost policy" release indemnities from Garcia (Skillman, ff. 395-397). Smith mentions neither Brust, Skillman, duplicating insurances nor "lost policy" releases, and the Court ignores all such suppressed facts.

Smith then recites "a representative of the broker again called at the office of defendant and requested a further extension of the coverage" and what allegedly "The broker advised *deponent*" and *Smith* told "the broker" in this and another conference next day (ff. 300-304). He does not mention that first Skillman conferred again with *Brust* and with *Thurnall* (Skillman, ff. 399-400), nor Smith's own conference with *Skillman* and *Thurnall* (Skillman, f. 402). Actually, as with the prior insurances, Skillman applied for the non-delivery insurances to Brust—*who refused to underwrite it* (f. 399); then Skillman applied to Brust's superior Manager Thurnall, *who refused to underwrite it* (ff. 400-401); then Skillman and Thurnall talked to Smith, *who refused to*

sign the insurances, which Skillman on return to the broker's office told his superior Benfield (ff. 402-403). *Then* Benfield "decided to take the matter up, myself, direct" with Smith, and interviewed him on that and the next day (ff. 377-380). These facts Smith suppressed; and the Court ignored.

Smith states "I then advised the broker that *we* would make a *physical* inspection of the *beans* and if their condition was sound, the company would grant the extended coverage at an additional premium" (f. 304). He does not mention, but plaintiff's proof establishes that at first to both Skillman and Benfield in turn Smith demanded a "complete inspection" to "be made by independent inspectors, to be paid for by Garcia Sugars Corporation" (Benfield, f. 383; Skillman, ff. 402-403); that subsequently he voluntarily waived this; that he was more concerned with the fear of losing Garcia's insurance business than with taking the "complete inspection" precautions he realized were advisable; that he did not consent to underwrite the "non-delivery" risk until after Benfield told him that plaintiff's insistence was such that he feared that if defendant did not underwrite it for Garcia it must be procured elsewhere and defendant and the broker "would both lose the business" (ff. 378-379); that the duplicating insurances for which the "lost policy" release indemnities had been required were still outstanding, evincing a prior title claim of other creditor-pledgees thereof; that from this defendant well knew but suppressed from plaintiff that the "non-delivery" risk insured thus constituted at outset peculiarly a duty or obligation liability risk, to which as such defendant must have intended the special "non-delivery" insurances to attach; and that the premium charged accordingly was 5¢ per cent. per month (Skillman, f. 403; Benfield, f. 380). These facts Smith suppressed and the Court ignored.

Smith further states that "In connection with the issuance of the subsequent certificates sued upon herein, which contained the same broad coverage * * * I insisted" upon a physical inspection (f. 306). Actually these subsequent insurances were handled by Skillman with *Brust* and *Thurnall* (Skillman, ff. 405, 407) who give no affidavits; and they also involved duplicating insurances still outstanding, and defendant's taking "lost policy" release indemnities from Garcia (Skillman, ff. 406, 408-409); all of which Smith suppresses. The Court ignores such suppressed facts.

Smith's really sly statement that defendant at no time was "advised that warehouse receipts had been issued" and "*No mention* was ever made of warehouse receipts and no warehouse receipts were ever submitted to defendant" (ff. 307-308) thus *insinuates* but does not state that they were not contemplated by defendant. There is no affidavit from Brust or Thurnall as to this, nor as to whether *they* knew of or discussed or considered or saw warehouse receipts. And Smith's *insinuation* is belied both by the explanation in President WINTER's book that descriptions in negotiable certificates are designed to "fit the description" in "corresponding" bills of lading—or here, warehouse receipts—which together form part of "a commercial set" of documents (WINTER, MARINE INSURANCE, 2d Ed., pp. 133, 48), and by the admissions in the Amended Answer that the descriptions were identical, and that defendant knew the Garcia Company borrowed on companion warehouse receipts and insurance certificates (Comp., par. 41, f. 62, undenied). Moreover, since the "non-delivery" insurances were by dated special provisions effective forthwith, and in view of the "lost policy" release indemnities covering outstanding prior insurances; unless defendant contemplated warehouse receipts it must have contemplated an

even less formal medium of delivery claim, such as any form of delivery order whatever, with the risk as insured consequently intended as one still more broadly underwriting the warehouseman's or Garcia Company's obligation, credit or liability.

Skillman states that after the risk ultimately was first approved "Mr. Brust told me he would make up new coverage endorsements" (f. 404)—directly contrary to Smith's insinuation (f. 301) and the Court's holding (f. 450), without any affidavit from Brust, that defendant was not their author (cf. *contra, Bushey & Sons* v. *American Ins. Co.*, 237 N. Y. 24, 29).

Defendant at first was unwilling to insure any other risks than the perils of fire, lightning and sprinkler leakage only; and the first set of six certificates, dated March 20, 1939 (R., p. 61), covered only these perils, certified as having been made by endorsement to an open policy, No. CP37396 and effective March 17, 1939. *Plaintiff rejected these certificates* (Comp., par. 23, f. 37; Amended Answ., par. 8, f. 231). The Garcia Company then procured the March 24th forms of "endorsement" instruments to be attached to the *certificates*, by which defendant agreed "to also insure" from date certain additional risks (Comp., par. 24, f. 38; undenied). On retender of the certificates, together with these supplemental "endorsements" thereof, *plaintiff rejected these* (Comp., par. 25, f. 39; Amended Answ., par. 8, f. 231) upon the specific ground, among other things, that the risk of "non-delivery" default by the warehouseman was not insured against. Thereupon, the Garcia Company, through its brokers, again approached defendant for a *third time* and after negotiations with three successive underwriters, Brust, Thurnall and Smith (noted *supra*, pp. 27-28), procured the issuance by defendant (Comp., par. 26, f. 40; undenied) of the six March 30 instru-

ments of "endorsement" which recited they were to be attached to "*special* policy No. C. P. 37396/*NW9764*" (and the other numbers corresponding to those of the other *certificates* of March 20, 1939); and these by specially added clauses provided (R., p. 65):

> "* * * *it is hereby agreed* that *effective March 30, 1939,* this insurance *is* extended * * * *also to insure,* notwithstanding any exclusion in said endorsement, damage by * * * non-delivery, * * *." (Italics ours.)

Of the remaining ten certificates, issued later, eight dated April 5, 1939 and two dated April 14, 1939, certified first endorsements of insurance made on the policy on April 4, and April 11, 1939 covering risks of fire, lightning and sprinkler leakage, and then set forth by specially added clause, as of April 5 and April 14, 1939, that (R., pp. 69, 73):

> "This insurance *is* extended * * * *also to insure* notwithstanding any exclusion in said endorsement, damage by * * * non-delivery;" (Italics ours.)

The Garcia Company's *policy* No. 37396 contains a printed clause which "excludes" the risk of non-delivery unless "otherwise" and "specially" provided for "herein" (R., p. 47), *i. e.,* unless "specially" provided in the policy. "Exclude" means "To shut out; to hinder from entrance or admission * * * to keep out what is already outside;" (Webster's New International Dictionary). This clause obviously was designed by WINTER, not to fix the meaning of "non-delivery" as being already controlled by the policy, as held below (f. 443), but to prevent its ever being underwritten except after special

attention and by independent special clause, with or without limitation as specially provided in each case.

Defendant expressly admits that it had been informed and knew and understood that the insurances sued on "had been demanded by plaintiff as a condition" to financing the Garcia Company (Amended Answ., par. 14, ff. 237-238); that defendant issued them "voluntarily and without any inducement from plaintiff" (par. 16, f. 239), that "it did not rely on any representations made by the plaintiff or any agent or representative of the plaintiff" (par. 13, f. 237), and that the descriptions in the insurance contracts herein were the same as those in the warehouse receipts (par. 19, ff. 240-241).

There is no denial that on March 18, 1939, April 4, 1939, April 12, 1939 and May 16, 1939, respectively, plaintiff both made advances to Garcia Sugars Corporation, totalling $216,200, and executed for its account contracts with other third parties binding plaintiff for sale for September delivery, under the Rules of the New York Cocoa Exchange, of cocoa beans equal in tonnage to 47,480 bags (Comp., par. 11, f. 20, undenied); that Garcia Sugars Corporation, on such dates duly endorsed and delivered to plaintiff for value the ten negotiable or "order" warehouse receipts of Harbor Stores Corporation, certifying its receipt and covenanting to make delivery to order of 47,480 bags of cocoa beans (Comp., par. 16, f. 24, undenied; Exhs. B-1 to B-10, R., pp. 35-45); and on March 30, 1939, April 5, 1939, April 14, 1939 and May 16, 1939, respectively, duly endorsed and delivered to plaintiff for value the sixteen negotiable or "order" insurance contracts in suit issued by defendant (Comp., pars. 28, 32, 37, ff. 42, 46, 54, undenied; Exhs. D-1 to D-6, E-1 to E-6 and F-1 to F-10, R., pp. 61-75); that on May 24, 1939, plaintiff was and is owner and holder for value of the contracts of insurance in suit (Comp., par. 7, f. 14; Amended Answ., par. 3, f. 227); that on

May 24, 1939, plaintiff duly demanded delivery of said 47,480 bags of cocoa beans from Harbor Stores Corporation, which failed and refused to make delivery, is unable to make delivery, has been adjudged bankrupt, and is unable to pay plaintiff its damages, and that Garcia Sugars Corporation has been adjudged bankrupt (Comp., pars. 50, 51, 52, ff. 72, 73 undenied).

POINT I.

The court erred in the construction and effect given to the bankruptcy reclamation proceedings order.

The court held the reclamation proceeding order "adjudicated that plaintiff did not own the beans and was not entitled to possession of them" and that "it must be held plaintiff did not have any insurable interest therein" (f. 440). It treated the question thereafter as whether the insurances gave "protection against non-delivery of goods in which it did not have any insurable interest" (ff. 441-442).

Actually, the order merely adjudged as to reclamation rights broadly respecting such residue of beans as remained in the warehouse "on the 29th day of May, 1939, the date when the above named bankrupt was duly adjudicated as such, or at any time thereafter" (f. 277). In *Little, et al.* v. *General Ins. Co.*, decided May 7, 1942, Hulbert, *D. J.*, S. D. N. Y., quoted and disapproved the above ruling of Judge Bondy and held: "I do not so interpret the determination of the Referee in Bankruptcy * * *." He held the corresponding order dismissing the *Little* reclamation claim related only to sugar "now in the possession, custody or control of the trustees in bankruptcy", etc.

An adjudication thus pleaded collaterally which did not purport to decide the questions raised in the suit in which pleaded is neither decisive of nor pertinent to such questions, and cannot be given an effect beyond the points actually adjudicated (*Ocean Accident & Guarantee Corp.* v. *Old Nat. Bk.*, C. C. A. 6, 4 F. [2d] 753, 755; *Schreiner* v. *High Court of I. C. C. of F.*, 35 Ill. App. 576; *Donohue* v. *Vosper*, 243 U. S. 59, 65; *Russell* v. *Place*, 94 U. S. 606, 608, 610).

Application of descriptive provisions of written instruments "to external objects described therein is the peculiar province of the jury" (*Richardson* v. *City of Boston*, 19 How. [60 U. S.] 263, 270; *McNamee* v. *Hunt*, C. C. A. 4, 87 F. 298, 301). If, therefore, the "non-delivery" insurances could properly be held to be insurances of "external objects", *i. e.*, beans, as such, and if defendant had offered any evidence purporting to associate the insurances with beans still in the warehouse on May 29, 1939, and affected by the reclamation order, there still would have been a question of fact as to this being the proper application of the descriptive provisions of both the insurances and the warehouse receipts. But as no such evidence was offered, there was no basis, even on defendant's theory of the insurances, to treat the reclamation order as in any way relevant, beyond merely further confirming as absolute the "non-delivery" which had occurred May 24th.

Claims in reclamation proceedings and orders made therein are different, arising under different sections of the Bankruptcy Laws, from proofs of claims for debts, liabilities or damage (such as this plaintiff's claim for "non-delivery" damage), and neither adjudicate nor bar nor affect the latter nor the claimant's indemnity rights against third parties (*Thomas* v. *Taggart*, 209 U. S. 385; *In re Ross*, D. C. S. D. Tex., 39 F. [2d] 242; *In re Kaplan*

v. *Myers,* C. C. A. 3, 241 Fed. 459; *Karns* v. *Thomson & McKinnon,* D. C. D. Minn., 3rd Div., 22 F. Supp. 442, app. Dism'd C. C. A. 8, 102 F. [2d] 993; *Rankin* v. *Tygard,* C. C. A. 8, 198 F. 795; *Poswick* v. *Cutten,* 258 N. Y. App. Div. 218, aff'd 283 N. Y. 660).

Armour v. *Michigan Central R. R. Co.,* 65 N. Y. 111, and *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. (2d) 493, are closely in point as refuting the defense fundamentally. In the *Armour* case a judgment of replevin obtained by a third party was held to constitute no defense to an action against a carrier for "non-delivery" damage. The *National Bank of Tacoma* case held that "lack of delivery" indemnity insurance, issued under circumstances closely analogous to what defendant claims here, protected a bank against lack of delivery even after proof that the materials described and even the "order" recited as pledged in fact never had existed.

POINT II.

Contrary to Rules 56, 38, 39 and the Seventh Amendment, the court substituted itself for the jury, determined issues depending on credibility of witnesses, effect and weight of evidence and contractual intent, ignored defendant's suppression of facts and witnesses, and ignored and failed to treat petitioner's opposing papers as proving the facts, circumstances and intent shown therein.

Petitioner's cross-motion did not waive its opposition to defendant's motion, nor its right to jury trial; and the evidence either entitles petitioner to judgment as matter of law or requires trial by jury.

The Court obviously treated the case as having been submitted to it for final determination "on the pleadings and affidavits" (f. 437), with any right waived to have a

jury determine disputed or conflicting facts, the credibility of witnesses, and the intent of the parties. This is contrary to *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389; and to Rules 56, 38 and 39, and the Seventh Amendment, and constitutes both a grave injustice to plaintiff and a dangerous precedent.

Smith was a doubly interested witness whose statements, before being adopted, "should have been submitted to the jury" (*Brooks* v. *People's Bank,* 233 N. Y. 87, 94). The picture he painted was completely refuted and, with respect to defendant's motion, petitioner was entitled, before any judgment could be rendered for defendant, to have a jury determine the issues of fact as to the surrounding circumstances and intent.

Petitioner, as the "opposing party", was entitled to have all *its* evidence treated as proving all that it reasonably may be found sufficient to establish, to have drawn in its favor all inferences fairly deducible from its own evidence, to have all countervailing evidence of defendant disregarded by the Court, and to have all issues that depend on the credibility of witnesses and the effect or weight of evidence decided by a jury (*Gunning* v. *Cooley,* 281 U. S. 90, 94; *E. K. Wood Lumber Co.* v. *Andersen,* C. C. A. 9, 81 F. [2d] 161, 166, cert. denied; 297 U. S. 723).

Defendant does not contend that petitioner had no insurable interest in the risk of non-delivery, which it was fully entitled to protect by *indemnity* insurance (*Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. [2d] 493), with this defendant (*Great Lakes Transit Corp.* v. *Interstate Steamship Co.,* 301 U. S. 646, 652, 653). Defendant contends only it did not insure, nor intend to insure, such risk of "non-delivery".

This contention, the first cornerstone of defense, is one as to intent and meaning, and under the rule ap-

plicable "particularly to insurance cases" (*Union Trust Co.* v. *Whiton,* 97 N. Y. 172, 173), petitioner was entitled to have the questions of intent, purpose and meaning of the particular words used treated as questions of fact for the jury (*Wood* v. *Guarantee Trust & Safe Deposit Co.,* 128 U. S. 416, 424; *Pitney* v. *Glens Falls Ins. Co.,* 65 N. Y. 6, 17; *U. S. Rubber Co.* v. *Silverstein,* 229 N. Y. 168, 171; *Utica City Nat. Bank* v. *Gunn,* 222 N. Y. 204, 208; *Kavanaugh* v. *Kavanaugh Knitting Mills,* 226 N. Y. 185, 198; *Piedmont Hotel* v. *Nettleton Co.,* 263 N. Y. 25, reversing a summary judgment; *Rosenkranz* v. *Schreiber Brewing Co.,* 287 N. Y. 322, 325; *Rey* v. *Simpson,* 22 How. [63 U. S.] 341, 347).

The Court had no right to substitute itself for the jury, pass upon the effect of the evidence, find (or eliminate by ignoring) the facts involved in the issue and render judgment thereon; but "That is what was done in the present case" (*Baylis* v. *Travellers Ins. Co.,* 113 U. S. 316, 320-321).

The peculiar aptness of the foregoing authorities is shown by the fact that the decision below is assertedly based on "surrounding circumstances", and undertakes to assign to the "non-delivery" insurances a meaning peculiar to the case, as according to "circumstances" which the court selects to recite. But the Court selected and recited as the only facts considered by it the matters asserted or denied in defendant's moving papers. Repeatedly, a specific intent is assertedly deduced, or rejected as not following, from some assertion or denial by defendant (ff. 441, 444, 445, 446, 447, 448, 449, 450).

As well shown by *Compania de Navegacion* v. *Firemen's Fund Ins. Co.,* 277 U. S. 66, 68-81, and *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. (2d) 493, the special circumstances here of principal significance are those shown in plaintiff's opposing papers, which defendant's papers had suppressed and the Courts below have ignored.

Five such facts in particular either establish with the other evidence, *petitioner's* right to judgment or constitute strongest evidence requiring jury trial. These are (1) That defendant, after *three* of its underwriters had successively refused to underwrite "non-delivery", reconsidered and agreed to underwrite it to enable the Garcia Company to endorse it over to petitioner for the latter's reliance, after being told by Garcia's brokers that petitioner was so insistent on such protection that if defendant did not write it, it would be obtained elsewhere and defendant and the brokers "would both lose the business" (ff. 378-379). (2) Defendant then knew but did not advise petitioner that prior negotiable insurances of defendant describing the same quantities of beans were still outstanding pledged, as was the custom of the Garcia Company, together with warehouse receipts. (3) Defendant secretly obtained from the Garcia Company, and issued the insurances in return for "lost policy" release indemnities against duplicating prior insurances. (4) Defendant affirmatively demanded of the Garcia Company a "complete inspection", to be made by outside inspectors and paid for by Garcia, as a condition to underwriting the "non-delivery" risk;—and (5) Defendant then voluntarily waived this to the Garcia Company's brokers.

The first fact shows that the "end and aim of the transaction" (*Glanzer* v. *Shepard,* 233 N. Y. 236, 238, 239) was, not insurance of the Garcia Company, but the contemplated endorsement over of the insurances to petitioner, as a *bona fide* holder, for its reliance, *in lieu of and to prevent petitioner insisting on or obtaining insurance of "non-delivery" risk by any other insurers.* In view of this and the other facts, either defendant intended to insure the "non-delivery" risk, consistent therewith (*Compania de Navegacion* v. *Firemen's Fund Ins. Co., supra,* 277 U. S. 78, 80-81) as fully as it might be insured by any indemnity insurer (*e. g., Aetna Casualty &*

Surety Co. v. *National Bank of Tacoma,* C. C. A. 9, 59 F. [2d] 493), and broadly as a risk of what Winter on Marine Insurance, 2d Ed., 170-171, calls "liability loss" and affording protection to the endorsee additional to and dependent on the warehouseman's or Garcia Company's delivery obligation (*Great Lakes Transit Corp.* v. *Interstate Steamship Co., supra,* 301 U. S. 646, 652, 653); or it is guilty of having knowingly issued insurances designed to entrap, beguile and mislead petitioner (*National Bank* v. *Ins. Co.,* 95 U. S. 673, 678; *Voorhis* v. *Olmstead,* 66 N. Y. 113, 117, 118; *Conrow* v. *Little,* 115 N. Y. 387; *Skinner* v. *Norman,* 165 N. Y. 565, 571; *Reynolds* v. *Commerce Fire Ins. Co.,* 47 N. Y. 597, 604; *Nellis* v. *Western Life Indemnity Co.,* 207 N. Y. 320, 334; *Wolfe* v. *Security Fire Ins. Co.,* 39 N. Y. 49, 51; *Pratt* v. *N. Y. Central Ins. Co.,* 55 N. Y. 505, 512; *Rice Oil Co.* v. *Atlas Assur. Co.,* C. C. A., 9, 102 Fed. [2d] 561, 576).

Other facts ignored by the Court, though undenied by defendant, emphasize this. These are (6) That defendant had long been the insurer, in large amounts, for the Garcia companies, including the Insular and Harbor warehouse companies, and was familiar with their make-up. (7) It admits it knew Insular, which operated the warehouse until organization of Harbor a few months before the transactions in suit, was controlled by Garcia Sugars Corporation, but evades any positive statement as to what it knew of Harbor's similar control (ff. 235, 309). (8) It admits the Garcia Company had been in financial difficulties for several years, and that defendant knew the Garcia Company during this time had made and was continuing to make large borrowings on the security of negotiable warehouse receipts of *Insular* and *Harbor, together with defendant's negotiable certificates of insurance* (Comp., par. 41, ff. 62-63, undenied). (9) By the policy it issued to the Garcia Company, defendant "approved" Insular, despite the conflict of interest, for such

insurances to an amount of $1,925,000 (R., p. 58, par. G), and never troubled to change this formally to Harbor.

Novel to this Court is the question whether a semi-public institution such as a large and powerful insurance company, emitting at call of a favored customer which it admits was in financial difficulties and controls the warehouse, negotiable certificates of insurance designed for pledge with warehouse receipts thereof habitually used together, and this repeatedly when its securing of "lost policy" release indemnities against already pledged certificates gave it knowledge of probable duplicating pledges, can thus assist in bolstering as good the name and credit of its customer and the latter's controlled warehouses, to the extent of specially writing negotiable "non-delivery" insurances to prevent their being sought elsewhere, incidentally participating by the cumulative premiums, and then defend against a *bona fide* holder by asserting that it was not "advised" by its customer that the warehouse receipts were issued and intended as matter of law to leave the holder burdened with all "non-delivery" contract-liability risk.

Defendant was chargeable with knowledge of whatever full inquiry and the "complete inspection" it first demanded would have disclosed (*Supreme Lodge K. P.* v. *Kalinski*, 163 U. S. 289, 298; *Fidelity & Deposit Co.* v. *Queens Co. Trust Co.*, 226 N. Y. 225, 233; *Columbian Nat. Life Ins. Co.* v. *Rogers*, C. C. A. 10, 116 Fed. [2d] 705, 707, cert. denied 313 U. S. 561). This rule charges it with knowledge of the very facts which the Court states it denies actually knowing. And knowledge thus charged is the same as actual knowledge. With the knowledge it had, "in a commercial sense it acted in bad faith" (*Soma* v. *Handrulis*, 277 N. Y. 223, 234; *Rochester & C. T. R. Co.* v. *Paviour*, 164 N. Y. 281, 284-285).

If, despite such rule and the foregoing facts, it could fairly be said defendant did not know of the issuance or

negotiation to plaintiff of the warehouse receipts, this and the lack of specific enumeration of them in the insurances, would be ground under the evidence for giving the coverage a broader rather than a more narrow meaning (*Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 461; *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326; *Keyes* v. *Anderson*, C. C. A. 8, 262 F. 748; and *O'Brien* v. *North River Ins. Co.*, C. C. A. 4, 212 F. 102, 105).

If, despite the foregoing facts, defendant can be considered an innocent insurer, the rule is applicable that of two innocent parties he who induced reliance is liable to him who relied (*General Interest Ins. Co.* v. *Ruggles*, 12 Wheat. [25 U. S.] 408, 410-414; *Ryan* v. *U. S.*, 19 Wall. [86 U. S.] 514; *Comptoir Nationale d'Escompte de Paris* v. *The Law Car & General*, reported in Macgillivray on Insurance Law, 2d Ed., 504; *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, C. C. A. 9, 59 Fed. [2d] 493; *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326; *McWilliams* v. *Mason*, 31 N. Y. 294; and *Rothschild* v. *Frank*, 14 N. Y. App. Div. 399).

Neither the Court nor defendant attempts any explanation of the foregoing facts. The Court ignores them. Defendant "seems sedulously to avoid" (*Runkle* v. *Burnham*, 153 U. S. 216, 225) disclosing them. Smith's calculatedly misleading statement of half-truths constituted "as much a misrepresentation as if the facts stated were untrue" (*Equitable Life Ins. Co.* v. *Halsey Stuart & Co.*, 312 U. S. 410, 426). By this, and Smith's failure to file any further affidavit, and the failure of Brust and Thurnall to submit any affidavits whatever, defendant's "Silence then becomes evidence of the most convincing character" (*Interstate Circuit* v. *U. S.*, 306 U. S. 208, 226, and cases cited). To turn plaintiff out of Court on this record, without a jury trial, is contrary to Rules 56, 38, 39 and the Seventh Amendment.

POINT III.

The meaning of "non-delivery" under warehouse receipts, other commercial contracts and applicable law and trade usage is either a conclusive or an admissible meaning; and either entitles petitioner to judgment as matter of law, or requires trial by jury under Rules 56, 38, 39 and the Seventh Amendment.

In determining the meaning of a risk insured against the meaning, understood by and favorable to a *bona fide* endorsee of negotiable insurances, which a word has under warehouse receipts and similar commercial contracts, and the law and trade usage applicable thereto and under other forms of indemnity insurances, is an admissible meaning to which the innocent insured is entitled (*The G. R. Booth*, 171 U. S. 450, 459-460; *Hancox* v. *Fishing Ins. Co.*, 3 Sumn. 132, 137); with a broader rather than a more narrow meaning in every case to be given the word in insurances than under warehousing or carrier relationships (*Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80), and particularly so when special circumstances are shown such as to charge the insurer with knowledge of extraordinary risk (*Compania de Navegacion* v. *Fireman's Fund Ins. Co.*, 277 U. S. 78, 80-81).

Thus defined, "non-delivery" is definitely and solely a contract-liability risk under bills of lading (*Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 195; *Davis* v. *Roper Lumber Co.*, 269 U. S. 158, 161; *M. & T. Trust Co.* v. *Export S.S. Corp.*, 262 N. Y. 92, 98 cert. den. 290 U. S. 650; *The Falcon*, 3 Blachf. 64; *Roberts* v. *Chittenden*, 88 N. Y. 33).

In *Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, this Court defined "failure to make delivery" as follows:

> "The clause * * * specifically covers 'failure to make delivery' * * *. But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive,—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required" (241 U. S. 195).

Insurance is interpreted according to "what constitutes" a given risk or subject "at the place where" it is assumed (*Hazard's Adm.* v. *New England Marine Ins. Co.*, 8 Pet. [33 U. S.] 567, 582). And assuming even the reclamation proceedings order established what the lower Court held, it is clear that under applicable New York law petitioner at all times *bona fide* ran "non-delivery" risk and sustained "non-delivery" damage for which the warehouseman is liable in an action for "non-delivery" damage (*Armours* v. *Michigan Central R. R. Co.*, 65 N. Y. 111; *Hanover National Bk.* v. *American Dock & Trust Co.*, 148 N. Y. 612; *Rosenberg* v. *P. Viane, Inc.*, 109 Misc. 215 on "non-delivery" interpleader, and double judgment rendered therein, *sub nom. Joseph* v. *P. Viane, Inc.*, 118 Misc. 344, affd. 206 App. Div. 698).

Even under the facts which defendant concedes or asserts a bonded warehouseman and his bondsman alike would be liable to petitioner for "non-delivery" damage (*Maryland Casualty Co.* v. *Washington Loan & Banking Co.*, 167 Ga. 354). So would a surety on a "delivery" bond (*Ryan* v. *U. S.*, 19 Wall. [86 U. S.] 514) and *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, C. C. A. 9, 59 F. (2d) 493, establishes that an *indemnity* insurer would be liable therefor under a contract indemnifying against damage by "lack of delivery".

The Courts below chose to disregard completely these points and this established meaning thereby establishing

a precedent in conflict therewith. Unless such decision be reviewed and reversed it must operate either to overrule the foregoing authorities directly or indirectly, or to create the very confusion which *The G. R. Booth* holds should not be permitted.

Contrary to the view taken below of *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* the Ninth Circuit expressly held such was not a case of guaranty or suretyship, but of *indemnity* insurance, with the amount of recovery reduced for this reason to the advances the bank had made. Other decisions further establish the difference, and show the error of the lower Court treating the issue here as one between property insurance of beans, or guaranty or suretyship, with *indemnity* against *risk* ignored (*Great Lakes Transit Corp.* v. *Interstate Steamship Co., supra,* 301 U. S. 646, 652; *National Bank of Tacoma* v. *Aetna Casualty & Surety Co.,* 161 Wash. 239, 244; *First National Bank* v. *National Surety Co.,* 228 N. Y. 469; *Assets Realization Co.* v. *Roth,* 226 N. Y. 370; *Maine Lumber Co.* v. *Maryland Casualty Co.,* 216 N. Y. App. Div. 35, affd. 244 N. Y. 537; *Moore* v. *Capital Nat. Bank of Lansing,* 274 Mich. 56).

The insurance being against "non-delivery", and "non-delivery" being shown which caused plaintiff's damage, any antecedent cause or "reason" (f. 261) such as alleged (but unproved) below, is immaterial (*Ins. Co.* v. *Transportation Co.,* 12 Wall. [79 U. S.] 194, 199; *Bird* v. *St. Paul F. & M. Ins. Co.,* 224 N. Y. 47, 53, 55).

The decisions cited in the petition establish that with the "non-delivery" insurances properly interpreted as above, there is nothing in the principles as to wagering or "insurable interest," and no legal obstacle, preventing their enforcement.

Moreover, on any theory whatever, the warehouse receipts and petitioner's conceded *bona fide* status, coupled

with the further representations as to credit represented in defendant's own acts and covenants, constitute *prima facie* proof preventing disposition of the case in defendant's favor as matter of law (*Brooks* v. *Peoples Bank*, 233 N. Y. 87, 95).

POINT IV.

The court committed error in treating the broad meaning of the specially added clauses of the negotiable certificates as being qualified and cut down by recourse to clauses of the open policy having to do with insurances such as fire.

The English House of Lords and Court of Appeal have held in *Phoenix Ins. Co.* v. *De Monchy* (H. L.), 45 T. L. R. 543 (C. of A.), 44 T. L. R. 364, 366, 368, 369, that where negotiable certificates are issued which contain express terms of insurance, these in the hands of *bona fide* endorsees are themselves to be treated as self-contained independent contracts and that the terms of an open policy are not to be taken into account except to the extent that either the terms of the certificate or necessity may require. This Court has recognized the importance, especially in insurance, of conformity between the English law and our own (*The Eliza Lines*, 199 U. S. 119, 128; *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 493). The same principle, moreover, was applied in *Aetna Ins. Co.* v. *Willys Overland, Inc.*, N. D. Ohio, 288 Fed. 912 and *Imperial Shale Brick Co.* v. *Jewett*, 169 N. Y. 143. It is especially applicable here where the "non-delivery" insurances were never provided by the policy, but specifically *excluded* therefrom, to be written only *specially;* and were then *specially* written, not by the policy, but by present-tense covenants added to each certificate.

POINT V.

The court erred in holding inapplicable the principle that the form used should be construed most strongly against the insurer.

Bushey & Sons v. *American Ins. Co.*, 237 N. Y. 24, 29.

Conclusion.

Questions of first importance in the insurance and commercial world, and as to practice in the Federal Courts, the effect when collaterally pleaded in insurance cases of reclamation proceedings orders in bankruptcy, and the right under Rules 56, 38, 39 and the Seventh Amendment to jury trial of issues, are presented, which are novel, and on which the Circuit Court and District Court have in effect overruled decisions of this Court and of the highest State Courts and English Courts, and ruled contrary to the Seventh Amendment and Rules 56, 38 and 39. The serious errors committed necessitate a review by this Court; and review by certiorari should, therefore, be allowed.

Respectfully submitted,

HAROLD T. EDWARDS,
CHARLES A. ELLIS,
Counsel for Petitioner.

(16)

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. [redacted] 116

NIESCHLAG & CO., INC.,

Petitioner,

against

ATLANTIC MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. M. RICHARDSON LYETH,
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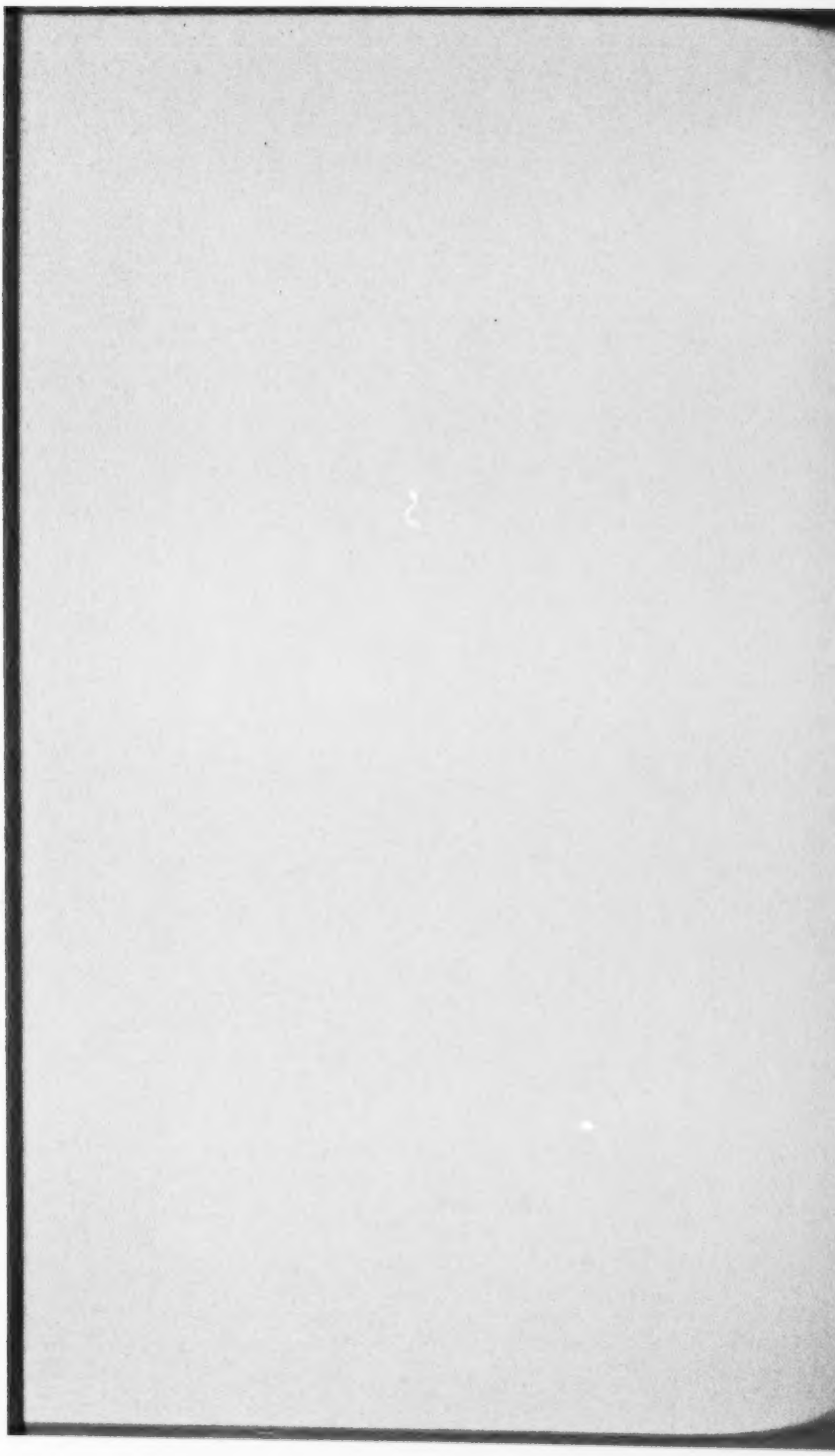

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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 1281

NIESCHLAG & CO., INC.,
Petitioner,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The *per curiam* opinion of the Circuit Court of Appeals affirming the judgment of the District Court on the opinion below (R. 161) is reported in 126 F. (2d) 834.

The opinion of the District Court (R. 145) is reported in 43 F. Supp. 797.

Jurisdiction

The opinion of the Circuit Court of Appeals was rendered February 14, 1942 (R. 161). A petition for rehearing was filed by petitioner with said court on Feb-

ruary 28, 1942 (R. 162) and said petition for rehearing was denied and the order of denial entered March 5, 1942 (R. 180, 181). The judgment of said court and the order for the mandate thereon was entered March 7, 1942 (R. 183).

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Section 347(a)).

Statement

This action at law is upon an open marine insurance policy on goods issued in the name of Garcia Sugars Corporation and/or as Agents (R. 46) and certificates of insurance in the same name issued thereunder which insured bags of cocoa beans of specified marks and numbers located in a certain warehouse (R. 61-75). Petitioner demanded a jury trial.

Respondent moved before the District Court for the Southern District of New York under Rule 56 of the Federal Rules of Civil Procedure for summary judgment in its favor upon the complaint, the amended answer and various affidavits annexed to the moving papers (R. 94). Thereupon petitioner, by cross-motion upon the same pleadings and upon certain affidavits which were submitted both in support of the cross-motion and in opposition to respondent's motion, likewise moved under the same rule for summary judgment in its favor (R. 112). The District Court (Bondy, J.) granted respondent's motion for summary judgment and denied petitioner's cross-motion (R. 152). The Circuit Court of Appeals

for the Second Circuit in a *per curiam* decision affirmed on the opinion below (R. 161).

The insurance certificates specified as the risks insured against, in addition to fire, lightning and sprinkler leakage, the following:

> "* * * risks, under uniform standard extended coverage endorsement No. 4 (Perils of windstorm, cyclone, tornado and hail, explosion, riot, riot attending a strike, aircraft, smoke, vehicles), also to insure notwithstanding any exclusion in said endorsement, damage by rain and/or other water, improper stowage and/or other cargo (but excluding vermin damage) theft of entire bags and/or non-delivery, all irrespective of percentage" (R. 65, 69-73).

The descriptive marks and numbers in the insurance certificates corresponded to the descriptive marks and numbers of bags of cocoa beans set forth in warehouse receipts issued by the warehouseman to Garcia Sugars Corporation (hereinafter called "Garcia" (R. 61-64, 69-75; 35-45).

Petitioner on various dates loaned money to Garcia under agreements in writing whereby, among other things, Garcia agreed to assign and transfer to the petitioner, duly endorsed in blank, negotiable warehouse receipts "representing * * * bags of various grades of cocoa beans, now owned by Garcia, as collateral security for the advances" (R. 27, 30, 34), and further agreed to fully insure the said "bags of cocoa beans herein pledged against loss by fire, theft, shipwreck, casualty, or otherwise", and agreed to deliver insurance policies covering any such loss (R. 29, 30, 32, 34). The warehouse receipts were pledged with and the insurance certificates transferred to petitioner by Garcia pursuant to those

agreements. Neither the loan agreements nor the warehouse receipts were mentioned in the marine policy or the insurance certificates and were never shown to the respondent (R. 103). Both the warehouseman and Garcia subsequently went into bankruptcy (R. 24, 25).

In fact there never were any such cocoa beans. The warehouse receipts were fraudulent and neither Garcia nor petitioner had any title to any bags of cocoa beans of such marks and numbers in the warehouse (R. 93). Petitioner did have title to certain other bags of cocoa beans not involved in this action, which it recovered (R. 93).

The defense pleaded, *inter alia,* was lack of insurable interest (R. 83).

Petitioner argued that the inclusion of the words "non-delivery" in the above quoted clause in the certificates had the effect of converting the insurance into a surety bond guaranteeing the performance of the warehouseman's obligation to deliver under the warehouse receipts; in other words, converting insurance of physical objects assumed by both parties to exist into a guaranty of documents.

Questions Presented

I. Whether the courts below correctly applied the law of New York in holding that a person having no insurable interest in goods insured against loss or damage under a marine policy and certificates issued thereunder cannot recover thereon.

II. Whether the courts below correctly held that upon the record before them there was no issue of fact to go

to the jury as to whether the insurance under the open marine policy and certificates issued thereunder upon cocoa beans against specified risks, including "theft of entire bags and/or non-delivery", can, by the inclusion therein of the words "and/or non-delivery", be converted into a guaranty bond guaranteeing the performance of the warehouseman's obligation to deliver under warehouse receipts issued by the warehouseman.

Argument

I

The courts below correctly applied the law of New York in holding that a person having no insurable interest in goods insured against loss or damage under a marine policy and certificates issued thereunder cannot recover thereon.

Petitioner asserts as one of the reasons for granting this writ that the courts below have decided important questions of local New York law and rights thereunder probably in conflict with applicable local decisions. On the contrary, the New York law is clear and the District Court in its opinion specifically relied upon the following decision of the New York Appellate Division and the New York statute that a person having no insurable interest in the subject matter of insurance upon goods or property against loss or damage cannot recover under a policy of insurance. *Miller* v. *Stuyvesant Insurance Co.*, 223 App. Div. 6 (1st Dept., 1928); *New York Insurance*

Law, §148.* Petitioner cites no cases contrary to or distinguishing these authorities.

Petitioner completely ignores the law as thus clearly enunciated and argues before this Court, not that it had any insurable interest in the cocoa beans, but that the courts below could not have found that it had no insurable interest upon cross-motions for summary judgment. The complaint did not allege any interest of the petitioner in the cocoa beans as is necessary under the New York law, as above pointed out, and therefore the complaint did not state a cause of action. Furthermore, the amended answer specifically alleged the lack of any insurable interest (R. 81-84), and, in addition, there was annexed to such answer an order entered in the reclamation proceeding in the warehouseman's bankruptcy proceeding in which it was held that petitioner was not the owner of or entitled to the possession of any bags of cocoa beans in the warehouse (except for certain other bags previously awarded to petitioner and not involved in this action) (R. 91). In the reclamation proceeding petitioner had sought to recover the cocoa beans referred to in the identical warehouse receipts alleged in this action.

There is not a suggestion in petitioner's complaint or in the affidavits submitted on its motion for summary judgment that petitioner had any title or interest in the cocoa beans. Petitioner's failure to plead or offer any proof of insurable interest would compel dismissal of the complaint even without reference to the order in the reclamation proceeding.

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* Appendix A.

II

The courts below correctly held that upon the record before them there was no issue of fact to go to the jury as to whether the insurance under the open marine policy and certificates issued thereunder upon cocoa beans against the specified risks, including "theft of entire bags and/or non-delivery", can, by the inclusion therein of the words "and/or non-delivery", be converted into a guaranty bond guaranteeing the performance of the warehouseman's obligation to deliver under warehouse receipts issued by the warehouseman.

Petitioner argues that the insurance here sued upon was a guaranty of the warehouse receipts and of the warehouseman's obligation to deliver thereunder. The basis for this argument is the inclusion of the words "and/or non-delivery" in the risks clause of the certificates. Its objection to the decision of the courts below to the contrary seems to be that the matter couldn't have been disposed of upon the cross-motions for summary judgment since the petitioner had demanded a jury trial. It argues that either judgment in favor of the petitioner should have been entered or the matter submitted to a jury, but that judgment in favor of the respondent upon its motion in some way deprives petitioner of a jury trial.

The fact is, as a reading of the record will indicate, there was no genuine issue as to any material fact. Therefore, in accordance with the provisions of Rule 56 of the Rules of Civil Procedure, the courts below were correct in granting judgment for respondent as a question of law.

Petitioner cites no case in which an insurance on goods against risks, including theft and non-delivery, has been held a guaranty of documents. It claims that the decision herein conflicts with various cited cases involving suits on bonds issued by a guaranty company guaranteeing the performance of contracts. It is submitted that the difference between insurance on property against loss and insurance guaranteeing the performance of contracts, viz., the difference between property insurance and guaranty and fidelity insurance, is so fundamental as not to require extended comment. In fact, under the statutes of New York the writing of guaranty bonds is confined solely to surety and casualty companies and is expressly prohibited to marine companies. See *New York Insurance Law*, §§ 310, 46.* Respondent, a fire and marine company, is prohibited by these provisions, and by its charter, from writing guaranty bonds.

Petitioner argues, however, that in spite of its having moved for summary judgment upon the pleadings and affidavits, the courts below could not have determined the question in favor of the respondent on its motion, but that the various inferences stressed in the petition should have been referred to a jury as to meaning, intent and purpose of the inclusion of the words "and/or non-delivery". In other words, petitioner claims that the District Court, so long as it would not grant petitioner's motion for summary judgment, should have denied both motions.

In denying petitioner's motion, the District Court, after a careful review of the entire record, held that there was no issue of fact presented and that respondent was entitled to judgment as a matter of law. The Circuit Court of

* Appendix B.

Appeals, likewise after a review of the same record, came to the same conclusion. If a triable issue of fact had been presented, both motions would have been denied.

Thus petitioner's argument really is that the record presents a triable issue of fact. Even though, in the last analysis, this may be a question of law, it cannot be seriously argued that it is a question of such general interest and importance as to justify this Court's granting certiorari, for the purpose of reviewing the record to determine whether any material question of fact was presented.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated, New York July 15, 1942.

Respectfully submitted,

J. M. Richardson Lyeth,
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APPENDIX A

Provisions of New York Insurance Law

"§ 148. INSURABLE INTEREST IN PROPERTY.

"No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. The term 'insurable interest,' as used in this section, shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage."

APPENDIX B

Provisions of New York Insurance Law

"§ 310. MEANING OF 'CASUALTY INSURANCE COMPANY' AND 'SURETY COMPANY'

"The term 'casualty insurance company' as used in this chapter shall include any company having power to do any one or more of the kinds of business specified in paragraphs seven, eight, nine, ten, eleven, thirteen, fourteen, fifteen, or seventeen of section forty-six. The term 'surety company' as used in this chapter shall include any company having power to do any one or more of the kinds of business specified in any of the sub-paragraphs of paragraph sixteen of section forty-six."

"§ 46. KINDS OF INSURANCE AUTHORIZED

"The kinds of insurance which may be authorized in this state, subject to the other provisions of this chapter, are set forth in the following paragraphs. Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits resulting therefrom; but no kind of insurance shall be deemed to include life insurance or insurance against legal liability for personal injury or death unless specified herein. In addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions

of this chapter, any insurer authorized to do business in this state may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this state. Each of the following paragraphs indicates the scope of the kind of insurance business specified therein;

"* * *

"16. 'Fidelity and surety insurance,' meaning

"(a) Guaranteeing the fidelity of persons holding positions of public or private trust;

"(b) Becoming surety on, or guaranteeing the performance of, any lawful contract except the following: (1) A contract of indebtedness secured by title to, or mortgage upon, or interest in, real or personal property; (2) A bond or undertaking of the kind specified in subparagraph (c); (3) Any insurance contract except as authorized pursuant to section sixty;

"(c) Becoming surety on, or guaranteeing the performance of, bonds and undertakings required or permitted in all judicial proceedings or otherwise by law allowed, including surety bonds accepted by states and municipal authorities in lieu of deposits as security for the performance of insurance contracts;

"(d) Guaranteeing contracts of indebtedness secured by any title to, or interest in, real property, only to the extent required for the purpose of refunding, extending, refinancing, liquidating or salvaging obligations heretofore lawfully made and guaranteed;

"(e) Indemnifying banks, bankers, brokers, financial or monied corporations or associations against loss resulting from any cause of bills of exchange, notes, bonds, securities, evidences of debts, deeds, mortgages, warehouse receipts, or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, including any loss while the same are being transported in armored motor vehicles, or by messenger, but not including any other risks of transportation or navigation; also against loss or damage to such an insured's premises, or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

"* * *

"20. 'Marine insurance,' meaning insurance against any and all kinds of loss or damage to:

"* * *

"(b) Person or to property in connection with or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance (but not including life insurance or surety bonds nor insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance or use of automobiles), and

"* * *."

Supreme Court of the United States

October Term, 1942.

No. 116.

NIESCHLAG & CO., INC.,
Petitioner.

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HAROLD T. EDWARDS,
CHARLES A. ELLIS,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1942—No. 116.

NIESCHLAG & CO., INC.,
Petitioner,

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Reply Brief for Petitioner in Support of Petition for Writ of Certiorari.

I.

Respondent's Brief requires reply because it misstates the "Questions Presented", facts, errors specified, this petitioner's contentions, inapplicable statutory provisions of a *New York Insurance Law* not in effect during 1939*, and even the statutory* and (unpleaded) charter powers of respondent; and it is important that this Court be "not in any degree influenced" thereby (*Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578) to misapprehend peti-

*All statutory provisions cited and set forth in Appendix A and B of Respondent's Brief (pp. 5-6, 8, 10-13) are from an inapplicable *New York Insurance Law* approved June 15, 1939, L. 1939, Ch. 882, which §601 thereof specifically made effective Jan. 1, 1940, and are not from *New York Insurance Law* of 1909, L. 1909, Ch. 33, as amended, in effect throughout 1939 and in March, April and May, 1939, the dates involved in this controversy. *Cf.* Appendix, *infra*, pp. 18-20.

tioner's application. This is no less important whether or not it be "quite plain that there was no purpose to mislead"; the summary nature of proceedings *for* certiorari peculiarly require that respondent's Brief equally with the petition be prepared "with studied accuracy" to enable "ready and adequate understanding of points" requiring this Court's attention (*Furness, Withy & Co., Ltd.* v. *Yang-Tsze Ins. Assn., Ltd.*, 242 U. S. 430, 433-434).

Rule XXXVIII of this Court provides "The *petition* shall contain * * * the questions presented;" that respondent may file "an opposing brief," and that "Only the questions specifically brought forward by the *petition* for writ of certiorari will be considered" (Italics ours). This Court has repeatedly held that where, as here, petitioner alone applies for certiorari, the questions and conflicts for review are those set forth in the *petition*[1] or "incidental to their determination",[2] or otherwise "adequately raised by the *petition* though not specified formally"[3].

II.

A. The *Petition* herein "formally" specifies *five* basic and important "Questions Presented" (Petition, pp. 7-10), together with *nineteen* specifications of erroneous rulings below in conflict with decisions set forth in the Petition (Petition, pp. 10-20).

Respondent's Brief, though containing a section identically entitled "Questions Presented" (Respondent's Brief, pp. 4-5), does not reproduce nor summarize such

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1. *Lucas* v. *Alexander*, 279 U. S. 573, 576; *Lloyd Sabando Societa Anonima* v. *Elting*, 287 U. S. 329, 331; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91; *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Federal Trade Comm.* v. *Pacific Paper Assn.*, 273 U. S. 52, 66. Cf. *Langnes* v. *Green*, 282 U. S. 531, 537-538.

2. *Rorick* v. *Devon Syndicate*, 207 U. S. 299, 303.

3. *Public Service Comm.* v. *Havemeyer*, 296 U. S. 506, 509. (Italics ours.)

five nor address its opposition to their review. Rather, without indicating that they are of respondent's design and not comparable to those of the Petition, it sets up *two* so-called questions of entirely different tenor and argues their lack of merit or unimportance;—*i. e.*, "I.—Whether * * * a person having no insurable interest in goods insured against loss or damage under a marine policy and certificates issued thereunder cannot recover thereon" and "II.—Whether * * * insurance upon cocoa beans * * * can be converted into a guaranty bond * * *", or whether an issue of fact as to *this* was presented (Respondent's Brief, pp. 4-5).

The Petition presents no such questions and seeks no such review. In direct contrast, the "Questions Presented" by the Petition involve review among other points, of *whether* the "non-delivery" insurances, in their *intent, and meaning,* are, as matter of law, insurances of goods against loss or damage, as distinct from insurances indemnifying petitioner's undenied, *bona fide,* insurable "non-delivery" risk and loss, and *whether* as matter of law petitioner had no insurable interest; and review of whether the *summary determination* of these questions and issues made below is erroneous under the evidence and under Rules 56, 38 and 39, the Seventh Amendment, the laws of Bankruptcy, *res adjudicata,* insurance, the law and trade usage respecting "non-delivery" risk and insurance thereof, and controlling decisions cited in the Petition as in conflict with the decision below.

B. Respondent's Brief does not cite, discuss nor distinguish any decision specified in the Petition, nor deny that the decision below conflicts therewith. Instead, whereas the Petition cites warehousing, carrier and insurance cases involving "delivery", "non-delivery" and "lack of delivery", respondent criticizes petitioner for not citing instead *fire* or other property-peril insurance

cases contrary to *Miller* v. *Stuyvesant Insurance Co.*, 223 App. Div. 6, and present *New York Insurance Law*, §148 (Respondent's Brief, pp. 5, 6).

But the question this presents, as to the *Miller* decision and any statutory provision effective during 1939 (replaced by the inapplicable present *Insurance Law*, §148), is that of the applicability of their *fire* and property insurable-interest rules to the negotiable "non-delivery" risk insurances.

Miller v. *Stuyvesant Ins. Co.* was an "action on a *fire* insurance *policy*" (223 App. Div. 7; italics ours); and the Court carefully pointed out therein that "the varieties of insurable interest in the subject of a *fire policy* are limited" (223 App. Div. 9; italics ours).

Present *New York Insurance Law*, §148, quoted as Appendix A of respondent's Brief, replaced only from January 1, 1940, the first sentence of §55* of the 1909 *New York Insurance Law*, as amended, which was in effect throughout 1939. Such §55* (quite differently from present §148) prohibited *issuance* of any "policy" of insurance upon any "property" except upon application and in name of some person having "an interest" in the "property"; but contained no definition of insurable interest, no provision respecting enforceability and nothing applicable to either *issuance* or enforcement of negotiable *certificates* of special insurances by marine underwriters of non-feasance or chose-in-action marine *risks* such as "non-delivery".

In contrast with §55, and evidencing its inapplicability and the absence of any legislative purpose that it should apply to negotiable *certificate* insurances of such risks by marine underwriters, are the parallel, independent provisions of §169,* and the related provisions of §150,* of the same 1909 law, as amended.

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*Appendix, *infra*, pp. 18, 19.

Such §169 contained parallel, comprehensive provisions (independent of §55) prohibiting *issuance* of "any binder, cover note, *certificate,* policy or other evidence of a *contract of insurance* appertaining to or connected with *marine risks*" save on application and in name of some person having "a *bona fide* interest, direct *or indirect*" in the "*subject matter* insured, or a *bona fide expectation* of acquiring such an interest" (par. 1); and "unless such binder, cover note, *certificate,* policy or other evidence of a *contract of insurance* shall, at the time of such issuance * * * *represent a bona fide contract of insurance* appertaining to or connected with the *risks* hereinbefore specified and made by an insurance corporation or underwriter which is *obligated thereby by way of indemnity in case of loss*" (par. 3; italics ours). This followed the related §150, which, in par. 1, defined " 'marine insurance' and 'marine business' and 'marine *risks*' " to mean insurance against "*any and all kinds* of *loss of* or damage to", not only vessels, goods, freights, cargoes, disbursements, profits, moneys, securities, etc., but expressly "*choses in action*" (*cf. Ellicott* v. *The United States Insurance Co.,* Md., 8 Gill. & Johns. 116, 169); and all these "in *respect* to, *appertaining* to or in *connection* with *any and all risks* or perils of * * * storage * * * incident thereto" (Appendix, *infra,* pp. 18, 19; italics ours.)

Thus, of the law effective in 1939, §55 concerns "property" insurances by a "policy"—such as a *fire* policy; whereas §169 concerns, in parallel manner, independently and broadly, insurances of "risks" by any "* * * *certificate,* policy or other evidence of a contract of insurance". §55 specifies "an interest" in the "property" insured by the "policy"; whereas §169 specifies "a *bona fide* interest, direct *or indirect*" or "*a bona fide expectation* of acquiring such an interest" in the "*subject matter*" insured by the "*certificate*" or other form of "contract of insurance". The emphatic contrast, even as to

a "vessel", is the requirement, not of an interest *in* the vessel as property, but "in the safe *arrival* of the vessel," viz., some pecuniarily evaluable *risk* contingent thereon. Both sections concern *issuance*—and the duty of the insurer in connection with *issuance*—rather than enforcement of contracts issued; and §169 emphasizes this as to marine underwriters by expressly requiring the *issuer* to see to it that any *certificate* issued shall represent a *bona fide* contract of insurance *obligating* the insurer "by way of indemnity in case of loss" (all italics ours).

Respondent's misquotations—whether by studied effort or inadvertence—from *Insurance Law* provisions not even in effect in 1939, while omitting any reference to the foregoing provisions, are thus gravely misleading.

Moreover, in quoting *part* of par. 20 of the inapplicable present *Insurance Law*, §46 (Respondent's Brief, p. 13), respondent omits to quote *subpar.* (*a*) *thereof*, which replaces with few changes par. 1 of §150, above noted, of the *Insurance Law* effective during 1939. Respondent also omits to quote or refer to present §41, which contains the present broad New York statutory requirement as to insurability of any *risk* or "fortuitous event" of "occurrence or *failure to occur*"; and which the present §148 supplements with reference solely to insurances of "property". Present §41 defines an insurance contract as "any agreement or other transaction" whereby an insurer is obligated to confer benefit of pecuniary value upon another party, * * * *dependent* upon the happening of a fortuitous *event in which* the insured or beneficiary *has*, or *is expected to have at the time of such happening* a material interest which will be adversely affected by the happening of such *event*. A fortuitous event is any *occurrence or failure to occur* which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." (Italics ours.) Note

how closely this parallels, in comprehensiveness, the above noted provisions of old §169 in effect during 1939.

This new §41, though not in effect in 1939, thus codifies the law of decisions such as cited in the Petition (pp. 18-19) that "whatever *act, event or* property, bears such relation to the person seeking insurance, as that it can be said, with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition" may be insured.

"Fire" and "non-delivery" are each "a fortuitous *event in which*", in 1939 under these decisions and now under new §41, an insured must have insurable interest to support insurance thereof. But *fire* is a physical phenomenon, positive in operation, necessarily involving and which itself identifies some *res* which is burned or heated. By contrast, "non-delivery" is a default or non-feasance or "failure to occur", negative in operation, neither operating upon, nor capable of occurring nor definable with reference simply to a *res* which *its operation* will identify, nor except by reference to a delivery contract right or obligation; *i. e., inherently* it *"must* mean" non-occurrence of a delivery as required by a "contract" or obligation (*Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, 241 U. S. 190, 195).

For insurability, therefore, the one peculiarly requires substantially a *jus in re* whereas the other peculiarly requires a mere *jus ad rem* at most. In *The Carlos F. Roses*, 177 U .S. 655, 666, this Court, and in *The Young Mechanic*, C. C. Me. 1855, 2 Curtis 404, 412, Justice Curtis of this Court distinguished the two. "A *jus in re* is a right, or property in a thing, valid as against all mankind. A *jus ad rem* is a valid *claim on one or more persons to do something*, by force of which a *jus in re* will be acquired" (2 Curtis 412; italics ours). A *jus in re* without a *jus ad rem* will support *fire* insurance; but a *jus ad rem* without a *jus in re* will not. Present *Insurance*

Law, §148, former *Insurance Law,* §55, and *Miller* v. *Stuyvesant Ins. Co., supra,* simply establish and apply this point and are inapplicable here. By contrast, a *jus ad rem* without a *jus in re* will support "non-delivery" insurance; whereas a *jus in re* without a *jus ad rem* will not. Present *Insurance Law,* §41, former *Insurance Law,* §§169 and 150, par. 1, and the warehousing, carrier and insurance cases involving "delivery", "non-delivery" and "lack of delivery" cited in the Petition establish this.

Respondent's Brief here and its motion papers below do not question petitioner's *bona fide* ownership of such a *jus ad rem*—a valid, insurable "non-delivery" risk.

C. Respondent's Brief affirmatively misrepresents that this "*Petitioner argued*" and "*argues*" that the "non-delivery" insurances converted the insurance "into a surety bond * * * a guaranty of documents," "a guaranty of the warehouse receipts" (Respondent's Brief, pp. 4, 7, 8; italics ours).

In direct contrast, the Petition (p. 19) and supporting Brief (p. 44) show that "non-delivery" insurances, whether by bond, policy or certificate, never constitute suretyship or guaranty, but constitute indemnity insurances against insurable non-delivery risk, and that in confusing the "non-delivery" insurances as construed by petitioner with guaranty or suretyship, treating petitioner's contention as involving guaranty, and treating the issue as involving choice between guaranty or suretyship and property insurance of beans (with indemnity insurance against insurable "non-delivery" risk ignored), the decision conflicts with controlling decisions of this and other courts. Indeed, the decisions cited in the Petition (p. 19) and emphasized below (R. 165) establish that if such a contract be written in the *form* of a *guaranty* or *surety* bond, it will be held, even *contrary to such*

form, to be a contract of indemnity insurance against the risk instead.

Then, without plea, evidence or materiality, or any such holding below, respondent argues *ultra vires*, asserting that "In fact" respondent "is prohibited" by §§310 and 46 of the present *New York Insurance Law* and "by its charter, from writing guaranty bonds" (Respondent's Brief, p. 8).

The defense of *ultra vires* is one that comes with ill grace from an insurer, and is rarely raised by insurance corporations. But when raised, it is raised by plea and proof. Particularly subject to scrutiny, therefore, is its merit and motive when, without plea or evidence, it is advanced in argument as "fact" and coupled with misstatement, as petitioner's position, of the precise opposite of that stated in the Petition.

What respondent apparently relies on is the parenthetic clause in par. 20 (b) of the inapplicable present §46 reading "(but not including life insurance or *surety bonds* * * *)." (Italics ours; cf. §150, par. 1[b] of 1909 *Insurance Law*, as amended, in effect in 1939, Appendix, p. 19, *infra*). This parenthetic clause, originally reading "(but not including life insurances or surety or fidelity bonds)", was first inserted by L. 1921, c. 236, as part of a provision adding power to insure risks to person or property "arising out of construction, repair, operation, maintenance or use" of the subject matter of any marine "primary insurance". Actually, were the point material, this is no *prohibition*, but simply a limitation of the *added* power thus granted. For example, respondent's original special act charter (L. 1842, c. 217, April 11, 1842) itself grants in §2, par. 3, power "To make insurance on lives"; and this undeniable power is, not prohibited, but identically 'not included' in the above subpar. (b) grant.

But whereas the clause says that *"surety bonds"* are not included, the insurance here is not by *"surety* bond", nor even by *"bond"*, but is by marine *certificates;* it is not suretyship or guaranty, but *indemnity* against risk; and *if* under present law, §46, par. 16 (or in 1939 under corresponding par. 4 of §70 of 1909 *Insurance Law,* as amended) a surety or casualty company might also write it, their power to do so would be under *subpar.* (*e*) of §46, par. 16 (Respondent's Brief, Appendix, p. 13), (or under par. 4 of §70 of the law in effect in 1939). And present subpar. (e) and former par. 4 specify—not guaranty or suretyship—but insurance *"Indemnifying* banks, bankers, brokers, financial or monied corporations or associations" against risks no whit broader in its field than the "marine *risks"* broadly defined in §150, par. 1 (Appendix, *infra,* p. 18), of the law effective in 1939 [or subpar. (a), which respondent did not quote, of par. 20 of present §46], for the marine insurance field.

That part of par. 4 of §70 of the old law comparable to and from which new subpar. (e) of par. 20 of §46 derives, was first added by L. 1915, c. 505 (Appendix, *infra,* p. 20), entitled "AN ACT to amend the insurance law, in relation to *indemnifying certain* institutions and individuals against loss" (Italics ours). It was designed to enable surety companies, theretofore writing only suretyship and guaranty bonds, to write such *"indemnifying"* insurance as to the "certain" class specified, viz., banks, etc.; it expressly called the contract authorized a "contract or *indemnity indemnifying"* such class, and it expressly excepted and prohibited that "no such contract or *indemnity indemnifying"* such class should encroach on the parallel "marine risks" field, viz., no such contract should "indemnify against loss caused by *marine risks"* (Italics ours). If there were no "marine risks" of this character underwritable by marine insurance, why

this provision? Or, if any parallel risk contract was to be prohibited to marine underwriters as a "surety bond," why its emphatic characterization as "indemnity indemnifying"?

A modified prohibition continued in §70, par. 4, of the *Insurance Law* in effect during 1939, still using the expression "No such *indemnity indemnifying* against loss", etc. (italics ours). Whether or not during 1939 it sufficiently overlapped the definition of *marine* risks to have permitted surety company insurance *"indemnifying"* the "non-delivery" risk here, this does not convert, nor permit such insurances to be converted, into *suretyship* nor *surety bond,* but itself constitutes and *calls* them, regardless of form, "indemnity indemnifying" a risk; and this does not withdraw from the marine field any such "marine risks", including even the "choses in action" risks (*cf. Ellicott* v. *The United States Insurance Co., supra*) specified in §150, par. 1 of the 1909 law, as amended, in effect in 1939 [and in §46, par. 20 (a) of the new law effective January 1, 1940], and insurable by *"certificates"* of marine insurance.

Where, therefore, as here, the insurance is not written in the form of a guaranty or surety bond, but is written as indemnity insurance in form as well as effect, this is correct from the start; and petitioner's simple action for recovery thereon cannot and its arguments do not involve converting the correct indemnity form into incorrect surety or guaranty form.

D. Respondent's Brief nowhere refers to the First of the "Questions Presented" by the Petition, viz., *whether* the reclamation proceedings order is *res adjudicata,* conclusive evidence or any evidence whatever rebutting insurable interest in "non-delivery" risk (Petition, pp. 7-8). In direct contrast, it affirmatively represents the record as establishing that "In fact" there

"never were" any such cocoa beans, that the warehouse receipts were fraudulent and that petitioner had no "title" to any bags of cocoa described (Respondent's Brief, p. 4).

This Court "cannot, of course, take the intimation of counsel in the brief as evidence of a fact not appearing on the record" (*Hussman* v. *Durham,* 165 U. S. 144, 150). And for this assertion of "fact" respondent cites solely "(R. 93),"—the page of the record containing only the very bankruptcy proceedings order questioned.

The *Petition* and the *record* herein show that whereas both the warehouse receipts and the insurance (both negotiable) were issued and duly negotiated to the petitioner for value *in March and April, 1939,* and whereas even the "non-delivery" occurred *on May 24, 1939,* the omnibus reclamation order in bankruptcy adjudged *only* that of such residue of goods as still remained in warehouse and passed to Receivers *on May 29, 1939* when the Receivers took over, none thereof were beans of which petitioner was owner or entitled to possession (R. 93; Petition, pp. 6, 7). The "requisite" fact "indispensable" (*Harrison* v. *Remington Paper Co.,* CCA 8, 140 Fed. 385, 400; *Union Central Life Ins. Co.* v. *Drake,* CCA 8, 214 Fed. 536, 545) to a specie reclamation from the bankruptcy trustees that *they* as Receivers shall have received *on May 29, 1939* from the bankrupt beans then still existing and actually in warehouse *on May 29, 1939* (*cf. Jackson* v. *Hale,* 14 *How.* [55 U. S.] 525, 528)—*the sole issue determined by the reclamation order* (R. 93)—is a fact neither conclusive of nor material to claim for "non-delivery" by Harbor Stores Corporation *on May 24, 1939* under *March and April, 1939* receipts, delivery rights, risks and insurances, regardless of the latter's construction. Even "The time when the rights of the parties were fixed differed in the two causes" (*Harrison* v. *Remington Paper Co., supra*).

First, therefore, the question *whether* it was error to treat the reclamation order as adjudicating that there "never were" any such beans is most real, and is fully presented by the Petition, as a question of the meaning and effect of such *order*. Second, the question whether such order, or even an adjudication that there "never were" any such *beans*, can be material—as distinct from the proved and undenied, insurable "non-delivery" risk petitioner was under and understood was fully insured—is most real and is fully presented by the Petition, as a question of *intent and meaning of the "non-delivery" insurances*, the principles controlling determination thereof, and *whether* the summary determination below of the issue of their *intent and meaning* can stand. Neither such question may properly be thus suppressed.

E. Nowhere referring specifically to the Second of the "Questions Presented" in the Petition (p. 8), nor to the issues of fact, evidence and authorities cited in the Petition in connection therewith, respondent argues that "there was no issue of fact to go to the jury *as to whether* the insurance * * * upon cocoa beans * * * can * * * be converted into a guaranty bond" (Respondent's Brief, pp. 4, 5, 7). As above shown, this and respondent's arguments meet no contention of the Petition; but it is gravely misleading as suppressing the questions actually presented.

The Petition (pp. 8, 11-12, 22) and supporting Brief (pp. 35-41) show that not only the issue as to *intent and meaning* of the "non-delivery" insurances, as an issue of fact on respondent's motion, but direct issues of fact as to the surrounding facts and circumstances, and dependent upon the credibility of witnesses, were summarily determined; and petitioner's evidence, vital admissions by respondent and respondent's suppression of facts and witnesses were ignored. Respondent submitted

no counter affidavits opposing petitioner's cross-motion; but petitioner's affidavits were submitted both in support of its cross-motion and in opposition to respondent's motion. The issues determinable on both therefore, were not identical as respondent's Brief (p. 8) appears to claim. Adequate *undisputed* proof was presented by *petitioner* to require granting its cross-motion, but was ignored; whereas the very factual points claimed by respondent and the court to justify granting respondent's motion were adequately disproved or put in issue by petitioner's opposing papers, the facts in which were ignored. Moreover, if any factual point in respondent's affidavits were "not contradicted", yet "No court has power to determine the truth or falsity of the evidence of these interested witnesses" (*Piwowarski* v. *Cornwell,* 273 N. Y. 226, 229, and cases cited in Petition, pp. 11-12).

Respondent does not deny that in presenting no affidavits by Brust and Thurnall it suppressed important witnesses and facts which a *trial* would enable a jury to hear and petitioner to cross-examine (Petition, pp. 12, 14), nor the significance of this, under this Court's decisions, as itself "evidence of the most convincing character" for petitioner (Petitioner's supporting Brief, p. 41).

The Petition charges (p. 22), and respondent does not deny, that if this summary adjudication be approved, summary judgment procedure, contrary to Rules 56, 38 and 39 and the Seventh Amendment, will enable defendants, while suppressing witnesses and facts, to procure judgments of dismissal based on ignoring both plaintiff's own evidence, vital admissions by defendant and defendant's suppression of witnesses and facts, and on treating plaintiff's rights as dependent on merely what defendant chooses to urge. These novel questions, under the new Rules and the Seventh Amendment, concerning "a right so fundamental and sacred to the citizen"

(*Jacob* v. *City of New York,* 315 U. S. 752) cannot properly be thus suppressed or ignored as unimportant.

F. Respondent's Brief nowhere mentions the Third, Fourth and Fifth "Questions Presented" in the Petition (pp. 9-10), but asserts the action "is upon an open marine insurance *policy* on goods * * * and certificates * * * which insured bags of cocoa beans" (Respondent's Brief, p. 2; italics ours). It ignores the original holding herein by Knox, *D. J.,* that "Suit is based upon the covenants of" "defendant's *certificates* of insurance" (R. 155, f. 465; italics ours); and it never discusses the *questions* whether the "non-delivery" insurances are to be treated as made by, and the action as based on the *certificates,* nor whether the "non-delivery" insurance covenants of the certificates cover petitioner's undeniably insurable "non-delivery" risk.

It cites no case whatever involving whether "non-delivery" insurance, expressly made by specially added clauses of negotiable certificates, while not provided by but excluded from a separate non-negotiable policy, is to be treated as made solely by the *certificates* and not to be qualified, cut down or confused as to a *bona fide* endorsee by recourse to any *policy.* It does not deny that the summary determination below conflicts as to this with *Phoenix Ins. Co.* v. *De Monchy* (H. L.) 45 T. L. R. 543 (C. of A.) 44 T. L. R. 364 and *Aetna Ins. Co.* v *Willys Overland, Inc.,* 288 Fed. 912, and other decisions, as alleged in the Petition (pp. 9, 14).

It does not discuss nor suggest (nor did the courts below suggest) any *meaning* whatever for the "non-delivery" insurances, nor leave room for their having any meaning whatever. It cites no case whatever involving "non-delivery" insurance, nor any statute or rule of law applicable to "non-delivery" insurance. It does not deny that the summary determination below of the *intent and meaning* of "non-delivery", as insurable risk and

as risk insured, conflicts with the "non-delivery" decisions cited in the Petition, and in disregarding the meaning they establish conflicts with *The G. R. Booth,* 171 U. S. 450, 459-460, as alleged in the Petition (pp. 9, 16-17).

It does not deny that the express refusal below to apply the principle of liberal construction conflicts with *Bushey & Sons* v. *American Ins. Co.,* 237 N. Y. 24, as alleged in the Petition (pp. 9-10, 20).

Negotiable warehouse receipts and bills of lading are among the most important credit media of the world; and each alike carries a *jus ad rem;*—an insurable "non-delivery" indemnity *right* and *risk.* Today, with each alike there is negotiated throughout the world negotiable insurance certificates, specifically designed to be so negotiated. This "connotes the use of certificates to amounts running to many millions of dollars annually", all issued "for the primary purpose of being included with other documents used in financing" (*Thayer, Marine Insurance Certificates* [1935], 49 Harv. Law Rev. 239, 244). Of highest importance to merchants and underwriters alike, throughout the commercial world, is whether "non-delivery" insurances contained in specially added covenants of such *negotiable certificates* cover (in accord particularly with *The G. R. Booth, Phoenix Ins. Co.* v. *DeMonchy, supra,* former *Insurance Law,* §§169 and 150, par. 1, present *Insurance Law,* §§41 and 46[20] [a], and the "lack of delivery" decisions cited in the Petition), the insurable "non-delivery" *risk* evidenced by accompanying warehouse receipts or bill of lading, with the same meaning "non-delivery" has thereunder; or whether such "non-delivery" risk is not effectively insurable by indemnity underwriters, or is insurable only by indemnity bond separate from indemnity certificate, or has, contrary to *The G. R. Booth, supra,* different connotation and meaning in the three types of commercial contract,

warehouse receipt or bill of lading, indemnity bond, and indemnity insurance certificate.

Upon these questions, fully presented by the Petition, and the importance of which respondent does not deny, "The results reached have been too different, the opinions too conflicting" in the decisions (Thayer, *Marine Insurance Certificates, supra,* 49 Harv. L. Rev., p. 259). This Court should now review and determine them.

The writ of certiorari should be granted for review of the questions and conflicts presented by petitioner.

Respectfully submitted,

HAROLD T. EDWARDS,
CHARLES A. ELLIS,
Counsel for Petitioner.

APPENDIX.

I.—*Provisions of New York Insurance Law of 1909, as Amended, in Effect Throughout 1939, and Until Supplanted January 1, 1940 by the New Insurance Law (Inapplicable Here) Cited by Respondent.*

§55. *Insurance without the consent of the insured prohibited*

No policy of insurance shall be issued upon any property except upon the application and in the name of some person having an interest in the property. * * *

[Note. This section continued with provisions relating to life and health insurance.]

Article 4—Marine Insurance Corporations.

§150. *Definitions; incorporation.*

1. The terms "marine insurance" and "marine business" and "marine risks" shall mean insurance or reinsurances against any and all kinds of loss of or damage to:

(a) Vessels, craft, aircraft, cars, automobiles and vehicles of every kind (excluding automobiles operating under their own power or while in storage not incidental to transportation), as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit, or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being as-

sembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marine builder's risks and all personal property floater risks, and

(b) Person or to property in connection with or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance (but not including life insurance or surety bonds); but, except as herein specified, shall not mean insurances against loss by reason of bodily injury to the person, and * * *.

§169. *Prohibited acts in connection with marine insurance.*

1. No person, partnership, association or corporation shall knowingly issue or deliver in this state any binder, cover note, certificate, policy or other evidence of a contract of insurance appertaining to or connected with marine risks and risks of transportation and navigation, including the risks of lake, river, canal and inland transportation, save on the application and in the name of some person having a *bona fide* interest, direct or indirect, either in the safe arrival of the vessel in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a *bona fide* expectation of acquiring such an interest; nor shall any broker or other person, partnership, association or corporation not having such a *bona fide* interest knowingly apply for, effect, accept or transfer in this state any binder, cover note, certificate, policy or other evidence of a contract of insurance upon such risks unless duly authorized so to do by a person, partnership, association

or corporation having such a *bona fide* interest or his duly authorized agent.

* * * * * *

3. No person, partnership, association or corporation shall knowingly issue or deliver or accept or transfer in this state any binder, cover note, certificate, policy or other evidence of a contract of insurance appertaining to or connected with marine risks and risks of transportation and navigation, including the risks of lake, river, canal and inland transportation and navigation, unless such binder, cover note, certificate, policy or other evidence of such contract of insurance shall, at the time of such issuance, delivery, acceptance or transfer, represent a *bona fide* contract of insurance appertaining to or connected with the risks hereinbefore specified and made by an insurance corporation or underwriter which is obligated thereby by way of indemnity in case of loss."

II.—*The Statute First Authorizing Surety Companies to Indemnify Certain Risks, Such As Now in Inapplicable Insurance Law, Subpar. (e) of §46, par. 16, Cited by Respondent.*

L. 1915, p. 1481, Chap. 505.

AN ACT to amend the insurance law, in relation to indemnifying certain institutions and individuals against loss.

* * * * * *

Section 1. Subdivision four of section seventy of chapter thirty-three of the laws of nineteen hundred and nine, * * * as amended * * * is hereby amended to read as follows:

4. Guaranteeing the fidelity of persons holding places of public or private trust. Guaranteeing the performance of contracts other than insurance policies; guaran-

teeing the performance of insurance contracts where surety bonds are accepted by states or municipalities; executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed; and indemnifying banks, bankers, brokers, financial or monied associations, or financial or moneyed corporations, against the loss of any bills of exchange, notes, drafts, acceptances of drafts, bonds, securities, evidences of debt, deeds, mortgages, documents, currency and money, except that no such contract or indemnity indemnifying banks, bankers, brokers, financial or moneyed associations, or financial or money corporations, shall indemnify against loss caused by marine risks, or risks of transportation or navigation.

§2. This act shall take effect immediately.

[NOTE. This statute added, as new, the provisions commencing with the words "and indemnifying banks."]

(18)

Supreme Court of the United States

October Term, 1942.

No. 116.

NIESCHLAG & CO., INC.,
Petitioner,

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Petition for Re-Hearing on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

HAROLD T. EDWARDS,
CHARLES A. ELLIS,
Counsel for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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CASES CITED.

OTHER AUTHORITIES CITED.

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OCTOBER TERM, 1942.

NIESCHLAG & CO., INC.,
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ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Petition for Re-Hearing on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Summary Statement as to Jurisdiction.

The petition for Writ of Certiorari was denied by this Court on October 12, 1942.

Questions Presented and Reasons for Granting Re-Hearing.

The importance of the question to those engaged in trade and in financing trade, particularly of an international or maritime sort, as well as the need, oft expressed by this Court, of conforming our marine and insurance decisions to those of the British Courts (*Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487,

493), and of ironing out conflicting Circuit Court or State decisions, impel us to ask this re-hearing.

The frame of the question, so important commercially, is simple; an importer approaches another for finance on the collateral of negotiable warehouse receipts; the other to insure delivery insists upon protection against all warehouse risks by negotiable insurance certificates; the proposed lender, after twice rejecting negotiable certificates insuring only physical risks, fire, etc., suggests and accepts insurance against "non-delivery" which the importer secures from a marine insurance company which has long insured in large sums for the importer under an open marine policy covering goods in warehouse during "shipment, trans-shipment or re-shipment" (Rec. p. 57, par. 14 A: the only reason for a marine policy). The marine insurance company knew of and had long insured much of the importer's business and knew of his prior control of the warehouse and that the lender would not loan unless non-delivery was insured. By virtue of a control over the warehouse the importer, according to the Court below, issued the warehouse receipts on goods which did not belong to him. The marine insurance company prior to this transaction knew the importer was a large borrower on the collateral of its negotiable insurances and of the warehouse receipts issued when the importer controlled the warehouse and that the importer had the facility for emitting receipts with no goods behind them. Because, as the lower Court found in this proceeding for summary judgment (on disputed interpretation of a reclamation order) there were no goods in the warehouse belonging to the importer, there was no delivery and the lender sues the marine insurance company on its negotiable certificates.

Although the policy expressly excluded "non-delivery" insurance, requiring it to be "specially" written, the company pleaded a clause therein requiring ownership of or

interest in goods as a condition to coverage. The Court below held—on affidavits, refusing a jury trial—, that the insurance company only intended to cover non-delivery if the importer had an interest in the goods, thus applying the rule applicable to physical risks, when damage is to the *res;* it rejected the lender's claim that the insurance was addressed to the delivery obligation of the warehouseman, although admitting the question was close as to whether a jury should pass on the meaning. This was in reference to the rule that the meaning of an insurance contract is a jury question.

Its holding was contrary to the doctrine of the House of Lords (*Phoenix Ins. Co.* v. *deMonchy* [H. L.] 45 T. L. R. 543 [C. of A.] 44 T. L. R. 364, 366, 368, 369) that negotiable certificates of insurance cannot be qualified by an underlying contract of insurance, particularly where no reference is necessary because the negotiable certificates of themselves completely insure.

If this were a surety bond or guaranty, the lower court's opinion admits that recovery should be had and that in such instruments the words "non-delivery" run to the obligation to deliver rather than the goods and would cover what commonly in law is a warehouseman's failure to deliver. The Court cites for this *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* 59 F. (2d) 493; *Maryland Casualty Co.* v. *Washington Loan & B. Co.,* 145 S. E. 761, 766 (Ga. 1929); *Ryan* v. *United States,* 19 Wall. 514, 22 L. Ed. 172, but in citing *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* ignores that the instrument there was held to be insurance, although in the form of a bond and thus the common meaning of "non-delivery" was assimilated to the instrument and non-existence of that to be delivered was held no defense.

Undeniably in warehouse and bill of lading law failure to deliver because of facts similar to those here is a "non-

delivery''; in fact one right of redress is called non-delivery.

The lower court's opinion thus ignores the rule that the common meaning of words in commercial documents is, so far as possible, to be assimilated to all documents,—a rule especially applied to insurance and bills of lading (*The G. R. Booth,* 171 U. S. 450, 459-460).

The opinion also rejects application of the old established canon of *contra proferentem* contrary to the leading New York case of *Bushey & Sons* v. *American Ins. Co.,* 237 N. Y. 24.

Contrary, therefore, to the House of Lords and raising a conflict among Circuits, not to speak of the New York Court of Appeals, the holding effectually prevents an importer or lender by insurance from covering what commonly is regarded as a non-delivery.

That this ruling seriously hampers international trade and financing thereof there can be no doubt. What is a banker or importer now to do? The post-war upbuilding of the world is one of the paramount aims of the United Nations and particularly of our Government. Encouragement of international trade is primary in these aims.

But if warehouse receipts or bills of lading are presented to a banker as the basis for a loan,—the goods being stated to be in a remote part of the world, such as South America or Malay, either in a warehouse or on a boat (which may well be that of a small irresponsible company) and the banker says that he cannot know whether the ownership of the goods is in the warehouse receipt holder, and wants delivery assured by non-delivery insurance,—the lower court's holding is to the effect that insurance cannot perform this important function.

It can be done by a surety bond, the court says, containing identically the same language as in the insurance

policy. But surety bonds require a principal and he may be in Ecuador or Malay. It may be impossible to get his signature. The result, of course, will be no financing and hence no trade.

No less harm to trade and commerce is done by the repudiation of the "negotiable" doctrine of marine negotiable insurance certificates developed at great pains to meet the needs of traders and bankers,—and this by eliminating as against the lender defences personal to the original parties. These negotiable certificates have become a bulwark of international trade. Thayer has well developed this in *Thayer Marine Insurance Certificates* [1935] 49 Harv. Law Rev. 239, 244.

Is this doctrine to be thrown aside—are bankers and importers no longer to be able to rely on the protection of negotiability? If so, an effective implement of trade has been destroyed.

It will not do to say, as is tacitly inherent in the opinion below, that the banker or importer may expressly write in the negotiable certificate that the coverage is on the warehouse obligation or is good irrespective of ownership of the goods. Practical protection to the lender requires that it look only to the obligations to deliver and to the insurance thereof. Otherwise, trade cannot continue for in every instance the lender must get a lawyer who must draft complete coverage in long verbiage. This is why *contra proferentem* exists,—the insurance company has "a lawyer at his elbow",—a trained body of insurance experts and if it wishes conditions it has long since been required to specify them (Mr. Justice Stone in *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80, 85).

Not only does its importance but constitutional rights to a jury trial require that this question be not disposed

of on conflicting affidavits, in a summary judgment proceeding.

Respectfully submitted,

NIESCHLAG & CO., INC.,

By HAROLD T. EDWARDS,
Counsel.

Dated, New York, November 5, 1942.

We hereby certify that we are counsel for petitioner in the above matter in this Court; that we each have examined the foregoing petition and in our opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for purpose of delay.

HAROLD T. EDWARDS,
CHARLES A. ELLIS.